No. 16283

United States
Court of Appeals
for the Ninth Circuit

UNDERWRITERS AT LLOYD'S OF LONDON, VICTORIA INSURANCE COMPANY, LTD., ORION INSURANCE COMPANY, LTD., and EAGLE STAR INSURANCE COMPANY, LTD.,

Appellants,

vs.

CORDOVA AIRLINES, INC.,

Appellee.

Transcript of Record

Appeal from the District Court for the District of Alaska, Third Division

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—6-12-59

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Anchorage, Alaska;

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Los Angeles, California,

For Appellant.

BUELL A. NESBETT,
First Nat'l Bank Bldg.,
Anchorage, Alaska,

For Appellee.

In the District Court for the District of Alaska, Third Division

No. A—12349

CORDOVA AIRLINES, INC., and NATIONAL BANK OF ALASKA, a Corporation,

Plaintiffs,

vs.

UNDERWRITERS AT LLOYD'S OF LONDON, FARWEST GENERAL AGENCY AND COFFEY-SIMPSON AGENCY, INC.,

Defendants.

COMPLAINT

Plaintiffs complain of defendants and say:

First Cause of Action

I.

The plaintiffs are Alaska corporations and have complied with all Territorial conditions precedent to the commencement of this suit.

II.

That on October 24, 1955, the defendant, Farwest General Agency, hereinafter referred to as Farwest, as agent for the defendant insurer, Underwriters at Lloyd's of London, hereinafter referred to as Lloyd's, and as a partial insurer on its own behalf, through its agent, the defendant, Coffey-Simpson Agency, Inc., hereinafter referred

to as Coffey, issued its insurance certificate No. A-12732-178 to the plaintiff, Cordova Airlines, Inc., hereinafter referred to as Cordova, a copy of said certificate with endorsements, being attached hereto as Exhibit "A."

III.

That said insurance certificate, among other items of aircraft, insured a certain Cessna 180 airplane identified as Number N-1569-C, belonging to Cordova, against loss or damage in the maximum amount of Sixteen Thousand Dollars ($16,000.00).

IV.

That the plaintiff, National Bank of Alaska, was named as mortgagee in Endorsement No. 7 of the certificate of insurance with loss payable to it as its interest might appear, with respect to any loss or damage that might happen to Cessna 180 No. N-1569-C.

V.

That on or about December 18, 1955, and while the certificate of insurance was in full force and effect, the said Cessna 180, No. N-1569-C, was totally destroyed in an accident near Lake Iliamna, Alaska.

VI.

That the plaintiffs demanded payment of the sum of Sixteen Thousand Dollars ($16,000.00) due from the defendants Lloyd's and Farwest by reason of said loss, but these defendants have denied all liability under their certificate of insurance.

VII.

That the plaintiffs have complied with all conditions precedent to the commencement of this suit provided for in the certificate of insurance.

Second Alternative Cause of Action

I.

That the plaintiffs are Alaska corporations and have complied with all Territorial conditions precedent to the commencement of this suit and with all conditions precedent contained in the certificate of insurance hereinafter mentioned as Exhibit "A."

II.

That prior to October 24, 1954, the plaintiff, Cordova, issued invitations to various insurance firms in the Anchorage area to quote rates on aircraft insurance upon specified conditions and pursuant to said invitations received acceptable rate quotations from the defendant Coffey representing the defendant insurers, Farwest and Lloyd's.

III.

Accordingly and on October 24, 1954, Coffey, as agent for the insurers, Lloyd's and Farwest, caused to be issued to Cordova, insurance certificate No. A-12356-179, with endorsements, a copy of said certificate being attached hereto as Exhibit "B."

IV.

That said certificate of insurance, among other items of aircraft, insured a certain Cessna 180 air-

plane identified as N-1569-C, belonging to Cordova and mortgaged to National Bank of Alaska and the Reconstruction Finance Corporation, in that order of preference.

V.

That Endorsement No. 6 of said certificate contained a mortgage clause providing that any loss or damage paid under said certificate should be made to Reconstruction Finance Corporation as mortgagee, and that as to the interest of the mortgagee only, the insurance would not be invalidated by any act of neglect of the mortgagor or owners of the insured airplanes.

VI.

That Endorsement No. 7 of said certificate provided that loss or damage to Cessna 180, No. 1569-C, should be payable to the National Bank of Alaska, as its interest might appear, as separate mortgagee of this particular airplane.

VII.

That on March 1, 1955, and while the certificate of insurance (Exhibit "B") was in force, the mortgage held by Reconstruction Finance Corporation was paid in full by Cordova with monies obtained from the National Bank of Alaska and a new mortgage was executed by Cordova to the National Bank of Alaska, covering all items of aircraft owned by Cordova, including Cessna 180 No. N-1569-C.

VIII.

That on October 24, 1955, insurance certificate No. A-12356-179 (Exhibit "B") expired and was renewed by Certificate No. A-12732-178 (Exhibit "A") and that by mutual mistake of Cordova and the defendants, the renewal certificate (Exhibit "A"), contained a mortgage clause as Endorsement No. 6 identical to the mortgage clause in the renewed certificate (Exhibit "B") providing that loss or damage covered by the certificate be paid to Reconstruction Finance Corporation as mortgagee when as a matter of fact Cordova and the defendants all knew that Reconstruction Finance Corporation was no longer a mortgagee.

IX.

That when the renewal certificate of October 24, 1955, was issued (Exhibit "A") it was the intention of all of the parties hereto that Endorsement No. 6 thereto should read to provide that loss or damage covered by the certificate be paid to National Bank of Alaska instead of Reconstruction Finance Corporation and that as to the mortgagee, National Bank of Alaska, the insurance would not be invalidated by any act or neglect of the mortgagor or owners.

X.

That on or about December 8, 1955, and while the certificate of insurance (Exhibit "A") was in full force and effect, the said Cessna 180, No. N-1569-C, was totally destroyed in an accident near Lake Iliamna, Alaska.

XI.

That the plaintiffs demanded payment of the sum of Sixteen Thousand Dollars ($16,000.00) due from the defendants Lloyd's and Farwest by reason of said loss, but these defendants have denied all liability under their certificate of insurance.

Third Alternative Cause of Action

I.

Reallege and adopt Paargraphs I through XI of the Second Cause of Action.

II.

That prior to the issuance of the renewal certificate of October 24, 1955 (Exhibit "A"), the defendants, Coffey and Farwest, by reason of familiarity with Cordova's affairs were well aware that Reconstruction Finance Corporation was no longer a mortgagee and that the National Bank of Alaska had become the sole mortgagee of all of Cordova's insured aircraft and had been so informed by the plaintiffs.

III.

That the defendants, Coffey and Farwest, knowing the true financial realationship between Cordova and the National Bank of Alaska, nevertheless negligently issued the said renewal certificate (Exhibit "A") in form contrary to the plaintiff's insurance requirements and in such form as to deprive plaintiffs of the benefit of Endorsement No.

6 to their damage in the sum of Sixteen Thousand Dollars ($16,000.00).

Wherefore, plaintiffs pray for judgment as follows:

First Cause of Action

1. For judgment in favor of plaintiffs and against Lloyd's and Farwest in the sum of Sixteen Thousand Dollars ($16,000.00), less proper deductions to be determined by the Court, plus costs and a reasonable sum for attorney's fees.

2. For such other and further relief as to the court seems proper.

Second Alternative Cause of Action

1. In the event judgment is denied on the First Cause of Action, then a decree in favor of plaintiffs reforming the insurance contract to conform to the true intent of the parties and judgment for plaintiffs against Lloyd's and Farwest in the sum of Sixteen Thousand Dollars ($16,000.00), less proper deductions to be determined by the Court plus costs and a reasonable sum for attorney's fees.

2. For such other and further relief as to the Court seems proper.

Third Alternative Cause of Action

1. In the event judgment is denied on the first and second causes of action, then judgment against Farwest and Coffey in the sum of Sixteen Thou-

sand Dollars ($16,000.00) less proper deductions to be determined by the Court, plus costs and a reasonable sum for attorney's fees.

2. For such other and further relief as to the court seems proper.

Dated at Anchorage, Alaska, this 21st day of June, 1956.

McCUTCHEON & NESBETT,

By /s/ BUELL A. NESBETT,
Attorneys for Plaintiffs.

[Endorsed]: Filed June 21, 1956.

[Title of District Court and Cause.]

ANSWER

For their answer to the plaintiffs' complaint, defendants Underwriters at Lloyd's of London and D. K. Macdonald & Company, Inc., d/b/a Farwest General Agency (sued herein as "Farwest General Agency") allege as follows:

First Alleged Cause of Action

I.

Answering Paragraph I, deny that plaintiff National Bank of Alaska is an Alaska corporation, and deny knowledge or information sufficient to form a belief as to the remainder of the allegations contained in said paragraph.

II.

Answering Paragraph II, admit that on or about October 24, 1955, defendant Farwest General Agency, as agent for defendant Underwriters at Lloyd's of London, issued said insurance certificate No. A-12732-178 to plaintiff Cordova Airlines, Inc., but specifically deny that defendant Coffey-Simpson Agency, Inc., at any time acted as agent for answering defendants and allege that defendant Coffey-Simpson Agency, Inc., at all times material herein acted solely as agent for plaintiffs; deny that Exhibit A annexed to the complaint is a true and correct copy of said certificate of insurance and, except as so specifically admitted or denied, deny the allegations contained in said paragraph.

III.

Answering Paragraph III, deny the allegations contained therein, and allege that the maximum insurance coverage afforded said Cessna 180 airplane No. N-1569-C was in the sum of Fifteen Thousand Two Hundred Dollars ($15,200.00), subject to all the terms and conditions of said certificate of insurance.

IV.

Answering Paragraph IV, admit that plaintiff National Bank of Alaska was named as mortgagee in endorsement No. 7 of the certificate of insurance, with loss payable to it as its interest might appear with respect to Cessna 180 No. N-1569-C, subject to the terms and conditions of the cer-

tificate of insurance but, except as so specifically admitted, deny the allegations contained therein.

V.

Answering Paragraph V, admit the allegations contained therein, except that it is denied that the aircraft mentioned was totally destroyed, there being some salvagable parts.

VI.

Answering Paragraph VI, admit demand and non-payment, but deny that any sum was or is due plaintiffs from answering defendants under the terms of the certificate of insurance.

VII.

Answering Paragraph VII, deny the allegations contained therein.

Second Alleged Alternative Cause of Action

I.

Answering Paragraph I, deny the allegations contained therein.

II.

Answering Paragraph II, deny that defendant Coffey represented answering defendants and deny knowledge or information sufficient to form a belief as to the remainder of the allegations contained therein.

III.

Answering Paragraph III, admit the issuance of certificate No. A-12356-179 but, except as so spe-

cifically admitted, deny the allegations contained therein.

IV.

Answering Paragraph IV, admit that said certificate of insurance insured said aircraft, but deny knowledge or information sufficient to form a belief as to the mortgages upon said aircraft, or the respective priority thereof.

V.

Answering Paragraph V, deny the allegations contained therein, for the reasons that the required premium for the issuance of said endorsement Number Six was never paid; that said endorsement was not intended by the parties to become a part of, and it did not in fact become a part of, said certificate of insurance.

VI.

Answering Paragraph VI, admit the allegations contained therein.

VII.

Answering Paragraph VII, deny knowledge or information sufficient to form a belief as to the allegations contained therein.

VIII.

Answering Paragraph VIII, admit that certificate No. A-12356-179 (Exhibit B) expired on October 24, 1955, and that certificate No. A-12732-178 (Exhibit A) was thereafter issued, but, except as so specifically admitted, deny the allegations contained therein.

IX.

Answering Paragraph IX, deny the allegations contained therein.

X.

Answering Paragraph X, deny the allegations contained therein, and allege that said aircraft was substantially destroyed on December 18, 1955, under circumstances absolutely voiding any insurance coverage which might otherwise have been afforded plaintiffs with respect to said aircraft, under the terms of said certificate of insurance.

XI.

Answering Paragraph XI, admit demand and non-payment, but deny that any sum whatever is due from answering defendants to plaintiffs under said certificate of insurance.

Third Alleged Alternative Cause of Action

I.

Answering Paragraph I, repeat and reallege Paragraphs I through XI of this answer to plaintiffs' second alleged cause of action.

II.

Answering Paragraph II, deny the allegations contained therein so far as they concern defendant Farwest, and deny knowledge or information sufficient to form a belief as to the allegations contained therein insofar as the same relate to defendant Coffey.

III.

Answering Paragraph III, deny the allegations contained therein.

Further Answering Plaintiffs' Complaint, Defendant D. K. Macdonald & Company, Inc., d/b/a Farwest General Agency, Allege as Follows:

I.

At all times material herein said defendant was and is a corporation duly organized and existing under and by virtue of the laws of the State of Washington, having an office and place of business at the Exchange Building, Seattle, Washington, and said defendant was and is a duly licensed insurance broker under the laws of the Territory of Alaska, and has duly complied with all the laws thereof respecting said license.

Further Answering the Plaintiffs' Complaint, and for a First, Separate and Complete Defense Thereto, Defendant Underwriters at Lloyd's of London Alleges as Follows:

I.

Annexed hereto, marked "Exhibit A," is a true and correct copy of the "Face Sheet" of the certificates of insurance mentioned in the plaintiffs' complaint, which document contains a portion of the terms and conditions under which said certificates of insurance were issued.

II.

At the time of its destruction on or about December 18, 1955, the aircraft mentioned in plaintiffs' complaint was being operated by plaintiff Cordova Airlines, Inc., for an unlawful purpose, with the knowledge and consent of said plaintiff, in violation of Clause 4, "General Exclusions," and not in accordance with operations limitations established by the United States Civil Aeronautics Authority, in violation of Clause 2, "General Conditions," in that said aircraft was then and there being used for the transportation of a quantity of dynamite, with the result that the loss of said aircraft was not covered by the certificate of insurance at the time of its destruction.

Further Answering the Plaintiffs' Complaint, and for a Second, Separate and Complete Defense Thereto, Defendant Underwriters at Lloyd's of London Alleges as Follows:

I.

Repeats and realleges Paragraph I of said defendant's first affirmative defense.

II.

At the time of its destruction, on or about December 18, 1955, the aircraft mentioned in plaintiff's complaint was being operated contrary to the applicable operations limitations and approved operations manual of the United States Civil Aeronautics Authority, in violation of Clause 2, "General Conditions," of the certificate of insurance, in that said aircraft was overloaded.

Further Answering the Plaintiffs' Complaint, and for a Third, Separate and Complete Defense Thereto, Defendant Underwriters at Lloyd's of London Alleges as Follows:

I.

Repeats and realleges the allegations contained in Paragraph I of said defendant's first affirmative defense.

II.

At the time of its destruction, on or about December 18, 1955, the aircraft mentioned in plaintiffs' complaint was being operated contrary to the applicable operations limitations and approved operations manual of the United States Civil Aeronautics Authority, in violation of Clause 2, "General Conditions," of the certificate of insurance, in that plaintiff Cordova Airlines, Inc. had caused to be installed on said aircraft wheel skis and a tail ski, which modifications had not been approved by the Civil Aeronautics Authority designee or the appropriate Civil Aeronautics Authority Aviation Safety agent, with the result that the loss of said aircraft was not covered by the certificate of insurance at the time of its destruction.

Counterclaim of Defendant Underwriters at Lloyd's of London Against Plaintiff Cordova Airlines, Inc.

I.

Repeats and realleges all of the allegations, ad-

missions and denials contained in the foregoing answer.

II.

In the event that defendant Underwriters at Lloyd's of London should be adjudged to be liable, in any amount, to plaintiff National Bank of Alaska by reason of alleged endorsement No. 6 to insurance policy No. A-12732-178 (attached to plaintiffs' complaint as "Exhibit A"), which liability and endorsement are specifically denied, then, and in such event, said defendant Underwriters at Lloyd's of London is entitled to judgment over against plaintiff Cordova Airlines, Inc. for any such sum as may be awarded plaintiff National Bank of Alaska, by reason of the following provision, among others, contained in said endorsement:

> "Whenever this company shall pay the mortgagee any sum for loss or damage under this policy and shall claim that, as to the mortgagor or owner, no liability therefor existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party and to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may at its option, pay to the mortgagee the whole principal due or grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogati

shall impair the right of the mortgagee to recover the full amount of its claim."

Wherefore answering defendants demand judgment dismissing the plaintiffs' complaint as to them, with costs and a reasonable attorneys' fee, and pray that they may have such other, further or different relief as the cause of justice may require; and, as to the counterclaim of defendant Underwriters at Lloyd's of London, that said defendant may be awarded judgment against plaintiff Cordova Airlines, Inc. for any sum which may be awarded plaintiff National Bank of Alaska by reason of alleged endorsement No. 6 of certificate of insurance No. A-12732-178 annexed to plaintiffs' complaint.

MOODY & TALBOT,

By /s/ ARTHUR D. TALBOT,

Attorneys for Defendants Underwriters at Lloyd's of London and D. K. Macdonald & Company, Inc., d/b/a Farwest General Agency.

Receipt of copy acknowledged.

[Endorsed]: Filed July 23, 1956.

[Title of District Court and Cause.]

DEMAND FOR JURY TRIAL

Plaintiffs demand trial by jury on its first and third causes of action.

Dated at Anchorage, Alaska, this 21st day of June, 1956.

McCUTCHEON & NESBETT,

By /s/ BUELL A. NESBETT,
Attorneys for Plaintiffs.

[Endorsed]: Filed June 21, 1956.

[Title of District Court and Cause.]

STIPULATION FOR DISMISSAL

It is hereby stipulated by and between Plaintiff National Bank of Alaska, a corporation, and Defendant Coffey-Simpson Agency, Inc., that the action filed herein by the said Plaintiff may be and it is hereby dismissed without prejudice as against the said Defendant Coffey-Simpson Agency, Inc., only, each party to bear its own costs.

Dated, at Anchorage, Alaska, this 17th day of July, 1956.

/s/ BUELL A. NESBETT,
Of Attorneys for Plaintiffs.

/s/ EDGAR PAUL BOYKO,
Of Attorneys for Defendant Coffey-Simpson Agency, Inc.

/s/ ARTHUR D. TALBOT,
Of Attorneys for Defendant Underwriters at Lloyd's of London, Farwest General Agency.

[Endorsed]: Filed July 18, 1956.

[Title of District Court and Cause.]

MOTION TO DISMISS

The Defendant Coffey-Simpson Agency, Inc., by Edgar Paul Boyko and Raymond E. Plummer, its attorneys, moves the Court to dismiss the action, and particularly the claim alleged in the third alternative cause of action, as against the said Defendant Coffey-Simpson Agency, Inc., because the Complaint, and particularly said third alternative cause of action, fails to state a claim against the said Defendant upon which relief can be granted, for the following reasons:

1. The said Complaint fails to allege what, if any, duty was owed by the said Defendant to the Plaintiff Cordova Airlines and the manner in which said duty is alleged to have been breached.

2. The said Complaint fails to set forth in what manner the Plaintiff Cordova Airlines, Inc., was, or could have been, injured by the alleged negligence of the Defendant Coffey-Simpson Agency, Inc.

3. The said Complaint fails to allege in what manner the said Defendant Coffey-Simpson Agency, Inc., is claimed to have been negligent and, having set forth the fact that the said Defendant is a body corporate, fails to allege that the acts claimed to have been negligent were committed by any of the agents, servants, employees or representatives of said corporate Defendant and that such acts were

within the scope of authority or employment of such agents, or acquiesced in, condoned, or ratified by the said corporate Defendant.

4. The said Complaint fails to allege that the Defendant Coffey-Simpson Agency, Inc., had any notice of the substitution of mortgagees alleged to have taken place with respect to the insured aircraft, based upon which notice the said Defendant could or should have taken any legally required action.

5. The said Complaint shows upon its face that no privity of contract existed as between the Plaintiff, Cordova Airlines, Inc., and the Defendant Coffey-Simpson Agency, Inc., with respect to Endorsement No. 6, being a separate document attached to the insurance certificate filed herein as Plaintiff's Exhibit "A."

6. The said Complaint, and particularly Exhibit "A" thereof, shows upon its face that the said Endorsement No. 6 was never executed on behalf of either party to said contract and is therefore of no force and effect.

7. The said Complaint fails to allege any consideration for the assumption of the greater insurance risk alleged to have been incurred by virtue of the said Endorsement No. 6 referred to hereinabove.

8. The said Complaint shows upon its face that if Defendant was negligent, then Plaintiff must have been guilty of contributory negligence.

9. The said Complaint fails to comply with the requirements of Section 36-6-7, ACLA 1949, as amended by Chapter 25, SLA 1951.

/s/ EDGAR PAUL BOYKO,

/s/ RAYMOND E. PLUMMER,
Attorneys for Defendant Coffey-Simpson Agency, Inc.

Receipt of copy acknowledged.

[Endorsed]: Filed July 23, 1956.

[Title of District Court and Cause.]

HEARING ON MOTION TO DISMISS

Now at this time, this cause coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had, to wit:

Now at this time, cause No. A-12,349, entitled Cordova Airlines, Inc., and National Bank of Alaska, a Corporation, plaintiffs, versus Underwriters at Lloyd's of London, Farwest General Agency and Coffey-Simpson Agency, Inc., defendants, came on regularly for Hearing on Motion to Dismiss; Buell Nesbett present for and in behalf of plaintiffs; Edgar P. Boyko present for and in behalf of defendants; the following proceedings were had, to wit:

Argument to the Court was had by Edgar P. Boyko for and in behalf of defendants.

Argument to the Court was had by Buell Nesbett for and in behalf of the plaintiffs.

Argument to the Court was had by Edgar P. Boyko for and in behalf of the defendants.

Whereupon, the Court being fully advised in the premises, and having heard the argument of respective counsel, reserved its decision.

Entered August 17, 1956.

[Title of District Court and Cause.]

MINUTE ORDER RENDERING ORAL DECISION

Now at this time, this cause coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had, to wit:

Now at this time, arguments having been had heretofore and on the 17th day of August, 1956, in cause No. A-12,349, entitled Cordova Airlines, Inc., and National Bank of Alaska, a Corporation, plaintiff, versus Underwriters at Lloyd's of London, Farwest General Agency and Coffey-Simpson Agency, Inc., defendants; the Court now makes and renders its oral decision;

Court now denies motion to dismiss.

Entered October 30, 1956.

[Title of District Court and Cause.]

MINUTE ORDER IN RE TRIAL DATE

Before the Honorable J. L. McCarrey, Jr., District Judge.

Now at this time upon the Court's own motion,

It Is Ordered that the above cause be, and it is hereby, to be ready for trial upon 30 days' notice.

Entered January 2, 1957.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT
COFFEY-SIMPSON AGENCY, INC.

Defendant Coffey-Simpson Agency, Inc., by Edgar Paul Boyko and Raymond E. Plummer, its attorneys, for its answer to the Complaint herein and particularly to the claim alleged in the Third Alternative Cause of Action, alleges as follows:

First Defense

The said Complaint, and particularly the Third Alternative Cause of Action therein contained, fails to state a claim against this defendant upon which relief can be granted.

Second Defense

I.

Answering paragraph I of the Third Alternative Cause of Action, insofar as it realleges paragraph

I of the Second Alternative Cause of Action, this answering defendant admits that the plaintiff Cordova Airlines, Inc., is an Alaska corporation but denies each and every other allegation in said paragraph contained and further states that said paragraph fails to comply with Section 36-6-7 ACLA 1949, as amended by Chapter 25, SLA 1951.

II.

Further answering said paragraph I, insofar as it realleges paragraph II of the Second Alternative Cause of Action, this defendant admits that it quoted insurance rates to said plaintiff but denies knowledge or information sufficient to form a belief as to remainder of the allegations contained in said paragraph and therefore denies the same.

III.

Further answering said paragraph I, insofar as it realleges paragraph III of the Second Alternative Cause of Action, defendant admits the issuance of said certificate, but denies each and every other allegation contained in said paragraph.

IV.

Further answering said paragraph I, insofar as it realleges paragraph IV of the Second Alternative Cause of Action, defendant admits that said certificate of insurance insured said aircraft, but denies knowledge or information sufficient to form a belief as to the mortgages upon said aircraft, or the respective priority thereof and therefore denies the same.

V.

Further answering said paragraph I, insofar as it realleges paragraph V of the Second Alternative Cause of Action, defendant denies the allegations therein contained and further says that the said endorsement was never validly executed; did not become part of the said certificate of insurance, and that this defendant was not, and was never intended to be, a party or privy to, or in any other manner responsible for, the said Endorsement No. 6 or any of the contents thereof.

VI.

Further answering said paragraph I, insofar as it realleges paragraph VI of the Second Alternative Cause of Action, defendant admits the allegations contained therein, but says that this defendant was not, and was never intended to be, a party or privy to, or in any other manner responsible for, the said Endorsement No. 7 or any of the contents thereof.

VII.

Further answering said paragraph I, insofar as it realleges paragraph VII of the Second Alternative Cause of Action, this defendant denies knowledge or information sufficient to form a belief as to the allegations contained therein and therefore denies the same.

VIII.

Further answering said paragraph I, insofar as it realleges paragraph VIII of the Second Alternative Cause of Action, this defendant admits the ex-

piration and renewal of the respective certificates of insurance, but denies each and every other allegation contained in said paragraph.

IX.

Further answering said paragraph I, insofar as it realleges paragraph IX of the Second Alternative Cause of Action, this defendant denies the allegations therein contained.

X.

Further answering the said paragraph I, insofar as it realleges paragraph X of the Second Alternative Cause of Action, this defendant denies knowledge or information sufficient to form a belief as to the allegations contained therein and therefore denies the same.

XI.

Further answering the said paragraph I, insofar as it realleges the allegations contained in paragraph XI of the Second Alternative Cause of action, this defendant denies knowledge or information sufficient to form a belief as to the allegations contained therein and therefore denies the same.

XII.

Answering paragraph II of the Third Alternative Cause of Action, this defendant denies each and every allegation contained therein.

XIII.

Answering paragraph III of the Third Alternative Cause of Action, this defendant denies each

and every allegation contained therein and further says that plaintiff Cordova Airlines, Inc., was not and could not be injured or damaged in any manner as a result of one certain mortgagee being named instead of another in the said certificate of insurance or any endorsement thereof, because under the express terms of the endorsement No. 6, relied on by said plaintiff, and particularly the fourth paragraph thereof, the said plaintiff was and is required to repay to the insurer therein named any and all amounts of insurance paid to such mortgagee on account of its interest in the insured aircraft, regardless of the identity of such mortgagee. This defendant therefore further says that it appears upon the face of the Complaint that, as a matter of law, the said plaintiff did not, and could not, sustain any damage as alleged.

XIV.

Further answering the said Complaint, this defendant hereby denies each and every allegation thereof not herein specifically admitted.

Third Defense

For its Third and Affirmative Defense, defendant says that if in fact defendant negligently damaged the said plaintiff as alleged in the Complaint, which defendant denies, that said plaintiff was guilty of contributory negligence in failing to examine the said endorsement prior to execution, if in fact it was ever executed, to see whether or not the proper party was named therein as mortgagee;

in failing to bring to this defendant's attention the alleged failure to name the proper party as mortgagee; in failing to notify the said defendant of the fact of the alleged substitution of National Bank of Alaska for Reconstruction Finance Corporation as mortgagee; and in failing to demand that such substitution be made by endorsement or otherwise after issuance of said Endorsement No. 6, if in fact said endorsement was ever issued.

Fourth Defense

For its Fourth and affirmative defense herein, this defendant says that the alleged agreement contained in said Endorsement No. 6 referred to in the Complaint herein is void for want of any consideration whatsoever.

Fifth Defense

For its Fifth and affirmative defense herein, this defendant says that the alleged agreement contained in Endorsement No. 6 set forth in the Complaint herein, was an agreement to answer for the debt of another, to wit, the debt of the plaintiff Cordova Airlines, Inc., to the mortgagee therein named and neither said agreement nor any note or memorandum thereof was ever made in writing and subscribed by the party to be charged or by its lawfully authorized agent as required by the laws of the Territory of Alaska and specifically Section 58-2-2 ACLA 1949, as amended by Chapter 96, SLA 1955.

Sixth Defense

I.

For its Sixth and affirmative defense herein, this defendant says that it was stipulated and agreed in and by the certificate of insurance set forth in the Complaint that the aircraft covered thereby shall be operated at all times in accordance with its Operations Limitations and/or CAA Approved Operations Manual, and in accordance with Operations authorized as set forth therein.

II.

At the time of the destruction of the aircraft mentioned in plaintiff's Complaint the same was being operated contrary to said Operations Limitations and Operations Manual, in violation of the stipulations of the said certificate of insurance, in that said aircraft was overloaded; and, further, in that said aircraft was carrying modified equipment which had not been approved by appropriate authority; and, further, in that said aircraft was then and there being used for the transportation of explosives, contrary to applicable regulations.

III.

The aforesaid failure to comply with the terms and conditions of said certificate of insurance on the part of the plaintiff was done without the knowledge or consent of this defendant.

Seventh Defense

I.

For its Seventh and affirmative defense herein,

this defendant herein realleges and incorporates by reference the allegations contained in paragraphs I through III of the Sixth Defense herein.

II.

The loss alleged to have been sustained by the plaintiff, if it was sustained at all, resulted from matters and things excepted or excluded from coverage by the certificate of insurance set forth in the Complaint.

Eighth Defense

For its Eighth and affirmative defense herein, defendant says that it is a corporation of the Territory of Alaska, created and existing pursuant to the laws thereof and that if in fact it has been guilty of any negligent act or omission, which defendant denies, then such acts alleged to have been negligent would have to be done by agents, servants or employees of the said defendant and that said agents were not acting within the scope of their employment or authority, or by virtue of any condonation, acquiescence or ratification by this defendant, and that this defendant under its Articles of Incorporation and the laws of the Territory of Alaska did not and still does not have the power to do the alleged negligent acts or omissions averred in the Complaint.

Wherefore, having fully answered the Complaint herein, this answering defendant demands judgment dismissing the Complaint as to it, with costs and a reasonable attorneys' fee, and prays that it

may have such other and further relief as this Honorable Court deems equitable and just.

/s/ EDGAR PAUL BOYKO,

/s/ RAYMOND E. PLUMMER,

Attorneys for Defendant Coffey-Simpson Agency, Inc.

Receipt of copy acknowledged.

[Endorsed]: Filed January 21, 1957.

[Title of District Court and Cause.]

AFFIDAVIT OF JUDICIAL DISQUALIFICATION

United States of America,
Territory of Alaska—ss.

Edgar Paul Boyko, being duly sworn, deposes and says:

1. That he is one of the attorneys for the defendant Coffey- Simpson Agency, Inc., in the above-entitled cause and that he makes this affidavit of judicial disqualification pursuant to Section 54-2-1 ACLA 1949.

2. That the Honorable Judge before whom the above action is to be tried or heard is disqualified to act herein because he has a personal bias in favor of the plaintiff herein, Cordova Airlines, Inc., by reason of the fact that he represented the said corporate plaintiff as its attorney for many years, is

personally friendly with its president, founder and major stockholder, Merle Smith, and is deeply and sincerely interested in said plaintiff's welfare and success.

3. That this affidavit is made in good faith and not for the purpose of delay and that the above action is at issue and has been since the 11th day of February, 1957.

/s/ EDGAR PAUL BOYKO.

Subscribed and Sworn to before me, a Notary Public in and for the Territory of Alaska, this 13th day of February, 1957.

[Seal] /s/ CAROL M. WHITE,
Notary Public in and for
Alaska.

My commission expires: 8-16-1958.

Receipt of copy acknowledged.

[Endorsed]: Filed February 13, 1957.

[Title of District Court and Cause.]

ORDER

Upon filing of an affidavit on behalf of defendants, pursuant to Sec. 54-2-1 ACLA 1949, and good cause appearing therefor, it is by the Court

Ordered that the undersigned District Judge does hereby disqualify himself from acting in the above-

entitled cause and that the Clerk is directed to place the said cause upon the calendar of cases to be tried before a Visiting Judge.

Dated at Anchorage, Alaska, this 14th day of January, 1957.

/s/ J. L. McCARREY, JR.,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed February 14, 1957.

[Title of District Court and Cause.]

REQUEST FOR ADMISSIONS

Defendant Underwriters at Lloyd's of London requests plaintiff Cordova Airlines, Inc., within twenty days after service of this request to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

That each of the following statements is true:

I.

On the flight on December 18, 1955, on which it was destroyed, Cessna 180 N-1569-C, the aircraft of plaintiff Cordova Airlines, Inc., which is the subject matter of this action, was being operated by Cordova Airlines in the transportation of cargo for Morrison-Knudsen Co., Inc.

II.

The cargo mentioned in the preceding paragraph consisted of dynamite.

III.

The dynamite mentioned in the preceding paragraph was a brand or type known as "Atlas Giant 40% Blasting Gelatin."

IV.

The aforementioned cargo of dynamite was stowed aboard plaintiff's aircraft in cardboard boxes, each box weighing, including contents, approximately fifty-two pounds.

V.

Upon the flight in question plaintiff's aircraft had as cargo on board sixteen of the aforementioned cardboard boxes of dynamite.

VI.

On the flight on which it was destroyed the aforementioned Cessna aircraft was loaded with a weight of cargo, gasoline, etc., exceeding the Operations Limitations and Approved Operations Manual of the U. S. Civil Aeronautics Authority for said aircraft.

VII.

Prior to its destruction on December 18, 1955, plaintiff Cordova Airlines, Inc., had caused to be installed on said Cessna aircraft wheel skis and a tail ski, which modifications had not been approved by the Civil Aeronautics Authority designee or the

cognizant Civil Aeronautics Authority aviation safety agent.

MOODY & TALBOT,

By /s/ ARTHUR D. TALBOT,

Attorneys for Defendant Underwriters at Lloyd's of London.

Receipt of copy acknowledged.

[Endorsed]: Filed April 23, 1957.

[Title of District Court and Cause.]

RESPONSE TO REQUEST FOR ADMISSIONS

Plaintiff Cordova Airlines, Inc., responds to the request for admission herein and through its President admits and denies as follows:

I.

Admits Request No. I.

II.

Admits Request No. II.

III.

States that it cannot truthfully admit or deny Request No. III as the exact nature or descriptive designation of the dynamite is not known to affiant.

IV.

Admits that each box of dynamite including carton weighed fifty pounds.

V.

Denies request No. V.

VI.

Denies Request No. VI.

VII.

Denies Request No. VII except to admit that a wheel/ski combination rig had been installed on the aircraft in question.

/s/ MERLE K. SMITH.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed May 10, 1957.

[Title of District Court and Cause.]

DISMISSAL WITH PREJUDICE AS TO DEFENDANT COFFEY-SIMPSON AGENCY, INC.

It is hereby stipulated by and between the Plaintiff Cordova Airlines, Inc., and the Defendants Underwriters at Lloyd's of London, Farwest General Agency and Coffey-Simpson Agency, Inc., by and through their respective attorneys of record, that the action filed herein by the Plaintiff Cordova Airlines, Inc., may be, and it hereby is, dismissed with prejudice as against the said Defendant

Coffey-Simpson Agency, Inc., only, the parties to bear their respective costs.

Dated at Anchorage, Alaska, this 20th day of May, 1958.

/s/ BUELL A. NESBETT,
Attorney for Plaintiff
Cordova Airlines, Inc.

/s/ ARTHUR D. TALBOT,
Of Counsel for Defendants Underwriters at Lloyd's of London and Farwest General Agency.

/s/ RAYMOND E. PLUMMER,
Of Counsel for Defendant
Coffey-Simpson Agcy., Inc.

[Endorsed]: Filed May 21, 1958.

[Title of District Court and Cause.]

NOTICE TO PRODUCE

To: Buell A. Nesbett, Esq.,
Attorney for Plaintiffs.

Sir:

Please take notice that Defendants hereby require and request Plaintiffs to produce and have available at the trial of the above-entitled action all of the documents described and set forth in Defendants' motion for production of documents dated May 27, 1958, or such of said documents as are

within the possession, custody or control of the Plaintiff corporations, their attorneys, agents, employees, et cetera.

Dated May 27, 1958.

BOYKO, TALBOT & TULIN,

By /s/ ARTHUR D. TALBOT,
Attorneys for Defendants Underwriters at Lloyd's of London and D. K. MacDonald and Company, Inc., d/b/a Farwest General Agency.

Receipt of copy acknowledged.

[Endorsed]: Filed May 27, 1958.

[Title of District Court and Cause.]

MOTION FOR PRODUCTION OF DOCUMENTS

To: Buell A. Nesbett, Esq.,
Attorney for Plaintiffs.

Sir:

Please take notice that on the 29th day of May, 1958, at the hour of 1:30 p.m. o'clock on said day, or as soon thereafter as counsel can be heard, Defendant Underwriters at Lloyd's of London will move the Court for an order, pursuant to Rule 34 of the Federal Rules of Civil Procedure, requiring Plaintiffs, and each of them, to produce the follow-

ing described documents for inspection and photographing by Defendants:

1. The up to date log books of that certain Cessna 180 aircraft known as No. N-1569-C;

2. All investigative reports furnished to Plaintiffs by the U. S. Civil Aeronautics Board and Civil Aeronautics Administration pertaining to the airplane crash which is the subject matter of this action, including copies of any and all exhibits, regulations or other documents so furnished to Plaintiffs;

3. The loan records of Plaintiff National Bank of Alaska reflecting any and all payments received by it to date upon said Plaintiff's note and mortgage upon said Cessna 180 aircraft;

4. The Airworthiness Certificate in force for said aircraft upon the date of its loss;

5. All CAA forms ACA 337 showing maintenance and alterations upon said aircraft from the date of its acquisition by Plaintiff Cordova Airlines, Inc., to date of its loss;

6. All policies or certificates of insurance which plaintiff Cordova Airlines, Inc., claims were in force with respect to said aircraft upon the date of its loss;

7. Any and all certificates obtained or secured by Plaintiff Cordova Airlines, Inc., from the shipper of any explosives laden upon said aircraft on December 17 or December 18, 1955, said certificates

having to do with the contents of any such packages of explosives, and the compliance of said explosives and their packages with applicable regulations of the Civil Aeronautics Board and the Interstate Commerce Commission;

8. Any and all waivers secured by Plaintiff Cordova Airlines, Inc., from the Civil Aeronautics Administration or other Government authority permitting or allowing the carriage by said Cessna 180 aircraft of explosives by or for Morrison-Knudsen Co., Inc., on December 17 or 18, 1955;

9. Any writing which Plaintiff Cordova Airlines, Inc., claims constituted permission from Defendant Farwest General Agency for any flying done by said Cessna 180 aircraft on December 17 or December 18, 1955, for which a waiver issued by the Civil Aeronautics Authority was or should have been issued or required;

10. Any and all manifests or other documents showing the nature, description and quantity of any and all cargo and gasoline carried by said Cessna 180 aircraft on December 17 and December 18, 1955;

11. The CAA approved flight manual for Cessna aircraft N-1569-C.

The foregoing motion is based upon the annexed affidavit of Arthur D. Talbot, sworn to the 26th day of May, 1958, and upon all records and proceedings heretofore had herein.

Dated May 27, 1958.

BOYKO, TALBOT & TULIN,

By /s/ ARTHUR D. TALBOT,
Attorneys for Defendants Underwriters at Lloyd's of London and D. K. MacDonald and Company, Inc., d/b/a Farwest General Agency.

United States of America,
Territory of Alaska—ss.

Arthur D. Talbot, being duly sworn, deposes and says:

I am a member of the firm of Boyko, Talbot & Tulin, attorneys for Defendants Underwriters at Lloyd's of London, Inc., and D. K. MacDonald and Company, Inc., d/b/a Farwest General Agency. I make this affidavit in support of the motion of said Defendants for an order requiring Plaintiffs to produce the documents described in said motion.

To the best of my knowledge, information and belief, said documents are not privileged, and they constitute or contain evidence relating to matters within the scope of the examination permitted by Rule 26(b).

The principal issue in this case will be whether or not the subject aircraft was, at the time of its loss, engaged in the transportation of a large quantity of high explosives, in violation of applicable

Government regulations and the terms of the applicable certificate of insurance.

In addition, Plaintiff National Bank of Alaska seeks to have the policy of insurance reformed by the addition of a loss payable clause to it, which claim may be moot if said bank has received payment of the obligation secured by its mortgage upon said aircraft, subsequent to the commencement of this action.

/s/ ARTHUR D. TALBOT.

Subscribed and sworn to before me this 26th day of May, 1958.

[Seal] /s/ FERN E. TULIN,
Notary Public in and for
Alaska.

My commission expires: 10/21/61.

Receipt of copy acknowledged.

[Endorsed]: Filed May 27, 1958.

[Title of District Court and Cause.]

MOTION TO AMEND ANSWER BY ADDING FURTHER AFFIRMATIVE DEFENSES

On the 29th day of May, 1958, at the hour of 10:00 a.m. on said day, or as soon thereafter as counsel can be heard, the undersigned will move

the Court for an order allowing Defendants to amend their answer to the Plaintiffs' complaint by the addition of the following additional affirmative defenses:

I.

For a fourth, separate and complete defense to the plaintiffs' complaint, Defendant Underwriters at Lloyd's of London alleges that at the time of its destruction, on or about December 18, 1955, the aircraft mentioned in Plaintiffs' complaint was engaged in the transportation of a "Class A" explosive, for which flight or movement Plaintiff Cordova Airlines, Inc., failed to obtain a written waiver from the U. S. Civil Aeronautics Administration, in accordance with its regulations, and said Plaintiff also failed to obtain written permission for such flight from Defendant Farwest General Agency, with the result that said flight was for an unlawful purpose, in violation of the terms of the applicable certificate of insurance, and in violation of the terms of said certificate of insurance requiring said Plaintiff to secure written permission from Defendant Farwest General Agency, on behalf of the insurers, for any flight for which a waiver by the Civil Aeronautics Administration was required.

II.

For a fifth, separate and complete defense to the Plaintiffs' complaint, Defendant Underwriters at Lloyd's of London alleges that the flight upon which the aircraft mentioned in the Plaintiffs'

complaint was destroyed was for an unlawful purpose, in that on said flight plaintiff Cordova Airlines, Inc., transported a quantity of explosives without first having received from the shipper thereof a certificate that said shipment complied with the requirements of Part 49 of the Civil Air Regulations, as required by Section 49.3(b) thereof.

BOYKO, TALBOT & TULIN,

By /s/ ARTHUR D. TALBOT,

Attorneys for Defendants Underwriters at Lloyd's of London, and D. K. MacDonald and Company, Inc., d/b/a Farwest General Agency.

Receipt of copy acknowledged.

[Endorsed]: Filed May 28, 1958.

[Title of District Court and Cause.]

HEARING ON MOTION FOR PRODUCTION OF DOCUMENTS AND TO AMEND COMPLAINT

Before the Honorable Harry C. Westover, District Judge.

Now at this time the above cause came on for hearing; Mr. Buell Nesbett present for and in behalf of counsel for Plaintiff. Plaintiff not present in Court. Mr. Arthur D. Talbot present in Court as counsel for Defendant Lloyd's. Defendant not present in Court.

Mr. Talbot on behalf of Defendant stated to Court that this matter was scheduled for hearing this date but he is not certain of hour set.

Court on consulting file, finds time set was 1:30 this date but orders hearing to proceed at this time.

Mr. Talbot then informs Court that counsel have agreed to a pre-trial conference at this time and requests that James E. Fisher be associated with him as defense counsel.

Court ordered Mr. Fisher associated and that matter now proceed as pre-trial hearing.

Pre-Trial Conference

Oral stipulation that Exhibit A of the complaint and face sheet of insurance policy (handed to Court) be entered in the proceeding as Plaintiff's Exhibit 1.

Plaintiff's Exhibit 1 was duly offered, marked and admitted. (Exhibit A of complaint in file and face sheet of insurance policy.)

Mr. Talbot argued to Court that dynamite was at time of incident which is subject of complaint, prohibited cargo.

Mr. Nesbett argued on behalf of Plaintiff.

Mr. Talbot cited case on behalf of Defendant.

Mr. Nesbett cited cases and argued on behalf of Plaintiff.

Entered: May 29, 1958.

[Title of District Court and Cause.]

MOTION FOR DIRECTED VERDICT

Defendants move the Court, pursuant to Rule 50 of the Federal Rules of Civil Procedure, to direct a verdict for Defendants and against the Plaintiff upon Defendants' affirmative defense that Plaintiff's aircraft 1569-C was being used for an unlawful purpose at the time of its destruction, with the knowledge and consent of Plaintiff, upon the following grounds:

1. C.A.B. regulation No. 712, effective December 2, 1955, (Defendants' Exhibit A) did not authorize or apply to the shipment of Class A explosives by Morrison-Knudsen Co., Inc., by this aircraft, which was being utilized by Morrison-Knudsen under a 90-day charter from Plaintiff, for the general carriage of passengers and freight.

2. The knowledge of the pilot, employed and paid by Plaintiff, that he was carrying dynamite, a Class A explosive, is to be imputed to Plaintiff, as a matter of law.

3. The carriage of dynamite was unlawful because it was carried in violation of C.A.B. regulations 49.0 and 49.81, and Sec. 622(b) (1) of Title 49, USC, with the result that the Court must find, as a matter of law, that the airplane was being used for an unlawful purpose. Plaintiff does not dispute that the sole purpose for which the plane

was being used on the flight in question was the transportation of Class A explosives.

4. Dynamite is classified as an explosive A by Sec. 72.5 of the I.C.C. regulations, which classification was adopted by the C.A.B., by Sec. 49.81

5. The shipper did not give any certificate that the shipment of explosives complied with CA.B. regulations, as required by C.A.B. regulation 49.3(b) and Sec. 622(h) (1) of Title 49, USC.

Defendants further move the Court to direct a verdict for the Defendants and against the Plaintiff upon Defendants' affirmative defense that aircraft 1569-C was engaged in flying in which a waiver issued by C.A.A. was required, and that no permission for such flight was obtained from Farwest General Agency, for insurers, upon the following grounds:

1. The carriage of Class A explosives being prohibited by existing C.A.B. regulations, Plaintiff was required to secure a waiver from C.A.A., under C.A.B. regulation 49.3(b), and also the express written consent of Farwest General Agency (policy, General Exclusion 4). It is admitted by Plaintiff that it made no attempt whatever to secure permission for this flight from Farwest General Agency.

For the foregoing reasons, Defendants are entitled, as a matter of law, to a verdict and judgment against the Plaintiff on each of the above separate

and complete affirmative defenses to the Plaintiff's complaint.

JAMES E. FISHER,
BOYKO, TALBOT & TULIN,

By /s/ ARTHUR D. TALBOT,
Attorneys for Defendants.

Copy received: 6/4/58—9:10 a.m.

/s/ BUELL A. NESBETT,
Attorney for Plaintiff.

[Endorsed]: Filed June 4, 1958.

[Title of District Court and Cause.]

DEFENDANTS' PROPOSED JURY INSTRUCTIONS

Defendants' Proposed Instruction No. 1

One of the defenses asserted by the Defendants in this case is that, at the time it crashed, Cordova Airlines aircraft N-1569-C was being used for an unlawful purpose, with the knowledge and consent of Cordova Airlines. In considering this defense, you must first determine whether or not the aircraft was engaged in transporting explosives at the time of its loss. If you find that the aircraft was carrying explosives, then you must further determine whether or not any explosive so carried consisted of dynamite. If you determine that the plane was carrying dynamite, then you must next

determine whether or not a waiver was secured from the United States Civil Aeronautics Authority authorizing the carrying of dynamite on the flight on which the aircraft was destroyed, provided you find a waiver was necessary. If you find that the aircraft was carrying dynamite and that no such waiver had been secured from the Civil Aeronautics Authority, and find that a waiver was necessary, then you are instructed that the carrying of dynamite was unlawful. Dynamite is classified by the applicable Government regulations as a Class A explosive, and the transportation of dynamite by civil aircraft was, accordingly, prohibited by such regulations, unless a waiver was secured from issued by the Civil Aeronautics Authority. By Act of Congress, it is a criminal offense for any person to knowingly deliver or cause to be delivered to an air carrier or to the operator of any civil aircraft, for transportation in air commerce, or for any person to cause the transportation in air commerce of, any shipment or property the transportation of which is prohibited by any rule, regulation, or requirement prescribed by the United States Civil Aeronautics Board, relating to the transportation, packing, marking, or description of explosives.

Concerning the knowledge and consent of Cordova Airlines of the carrying of dynamite on the flight in question, is a question of fact for you to determine. if you find that dynamite was in fact carried, you are instructed that Ordinarily the knowledge and consent of a agent the pilot of the

aircraft is attributable to and is legally binding upon the principal Cordova Airlines, if you find that the pilot, Herbert Haley, was piloting the aircraft as an employee of Cordova Airlines. To put it another any other way, the knowledge and consent of the pilot is legally imputed to his employer. Accordingly, if you find that the pilot, acting as an employee of Cordova Airlines, knowingly consented to the transportation of dynamite on the flight in question, and if you further find that no special waiver was secured from the Civil Aeronautics Authority for the flight in question, and that the purpose of the flight was for the transportation of dynamite, then you are instructed that the aircraft was being used for an unlawful purpose with the knowledge and consent of Cordova Airlines, and your verdict must be for the Defendants and against the Plaintiff.

Citations

Certificate of Insurance, General Exclusion 4.49 USC Sec. 401 (3), 20(a), 32. 49 USC Sec. 560(a). 49 USC Sec. 622(h) (1). 14 CFR Sec. 59.0, 49.81, 49.71, 49 CFR Sec. 72.5 ("dynamite" and "blasting gelatin" are both classified as "high explosives," which, in turn, are classified as "Explosives A.") Sec. 72.5, right hand column of table, which governs maximum quantity permissable in one outside container, if shipped by rail express, provides, for high explosives, "See Section 73.86." Sec. 73.86(d) limits the shipment of explosives by rail express

to samples for examination and by a laboratory only, limits their packaging to wooden boxes, and limits the quantity for one outside package to 20 one-half pound-samples. Defendants contend that Class A explosives are prohibited for civil aircraft by the terms of Sec. 49.81, whether or not they can be shipped by rail express. Defendants submit, further, however, that the 50-pound cases of dynamite which was carried on the flight in question could not lawfully have been shipped even by rail express.

Defendants' Proposed Instruction No. 2

Further reference is made to the defense asserted that Cordova Airlines aircraft No. N-1569-C was allegedly being used for an unlawful purpose with the knowledge and consent of the plaintiff airline. You are instructed that the applicable United States Civil Aeronautics Board regulations provide that no air carrier or other operator of aircraft shall knowingly accept explosives for carriage by air unless the shipper or his authorized agent has issued a certificate to the air carrier, certifying that the shipment complies with Civil Aeronautics Board regulations governing the transportation of such explosives and it is a criminal offense for any person knowingly to violate the provisions of said regulation. Such a certificate, that the shipment of explosives complies with the regulations, is required by law prior to the carriage of explosives by air, in addition to any waiver which may or may not have been issued by the Civil Aeronautics Authority, for the flight upon which this aircraft was

destroyed. If you find, then, that the purpose of this particular flight on December 18, 1955, was to transport a quantity of explosives with respect to which no certificate of compliance had been issued to the air carrier or operator by the shipper, and that such use of the aircraft was with the knowledge and consent of Cordova Airlines, or the pilot (if you find that the pilot was an employee of Cordova Airlines) then your verdict must be for the Defendants and against the Plaintiff, on this issue, without regard to the question of whether or not any waiver had been secured from the Civil Aeronautics Authority for the flight upon which the aircraft was destroyed.

Citation

Certificate of Insurance, General Exclusion 4.49 USC Sec. 622(h). 14 CFR Sec. 49.3(b).

Defendants' Proposed Instruction No. 4

One of the defenses which the Defendants assert is their allegation that the aircraft was not being operated in accordance with its Operations Limitations and/or C.A.A. approved Operations Manual, and in accordance with operations authorized as set forth therein. Defendants claim that at the time it crashed the aircraft was overloaded, in violation of said regulations. In considering this defense, you must determine the maximum weight of aircraft and contents allowable under regulations for this particular aircraft. You must next de-

termine whether or not the aircraft was laden in excess of its legal limit. If you find that at the time it crashed the aircraft was overloaded, in violation of its Operations Limitations or C.A.A. approved Operations Manual, then your verdict must be for the Defendants and against the Plaintiff, on this issue.

Citation

Certificate of Insurance, General Condition No. 2. No causal relation between crash and violation of regulations prohibited by the certificate of insurance need be shown. 127 F. Supp. 124, affirmed 222 F. 2d. 642.

Defendant's Proposed Instruction No. 5

Defendants allege and claim three distinct defenses under the certificate of insurance:

1. That the aircraft was being used for an unlawful purpose, with the knowledge and consent of Cordova Airlines;

2. That the aircraft was engaged in flying for which a waiver issued by the Civil Aeronautics Authority was required, with the result that Cordova Airlines should first have secured the express written consent of Farwest General Agency, of Seattle, Washington, as agent for the Defendants; and

3. That the aircraft was not being operated in accordance with its Operations Limitations and/or C.A.A. approved Operations Manual, for

the alleged reason that the aircraft was overloaded, in alleged violation of such regulations.

You are instructed that the Defendants have are permitted to asserted each of these three defenses, which are based upon provisions in the certificate of insurance, which constitutes the only contract or agreement between the parties, and that your verdict must be in favor of the Defendants and against the Plaintiff if you find, by a preponderance of the evidence, having in mind all of the instructions given you by the Court, that the Defendants have established all or any one of these three defenses. You are also instructed that Defendants need not prove any relationship of cause and effect between any of the alleged breaches of the certificate of insurance and the crash of the aircraft. That is to say, the Defendants need not have proved that the alleged carriage of dynamite, or the alleged overloading of the aircraft, in any way caused, or contributed to, or increased the likelihood of, the airplane crash which did in fact occur.

Citations

Traveler's Protective Association of America v. Prinsen 291 U S 576. Bruce v. Lumbermen's Mutual Casualty Co. 127 F. Supp. 124, affirmed 222 F. 2d 642. Globe Indemnity Co. v. Hansen 231 F. 2d 895. At the pre-trial conference counsel for Plaintiff sought to inject the issue of negligence into this case, by asserting that general condition 2 is modified by general condition 3, which requires the

assured to "use due diligence" etc. A re-reading of the certificate makes clear, however, that general condition 3 refers to Sections 1 and 2 of the certificate "Loss or Damage to Aircraft" and "Third Party Liability") and general condition 3 in no way modifies or detracts from the force of the general exclusions of the policy, or from general condition 2. General condition 3 clearly imposes an additional duty of "due diligence" upon the assured, a possible defense which Defendants have not chosen to assert in this action.

Respectfully submitted,

JAMES E. FISHER,
BOYKO, TALBOT & TULIN,

By /s/ ARTHUR D. TALBOT,
Attorneys for Defendants.

[Endorsed]: Filed June 4, 1958.

PLAINTIFF'S PROPOSED INSTRUCTIONS

Plaintiff's Proposed Instruction No. 1

The Defendants contend, among other defenses, that the policy of insurance here involved relieves them from liability for payment for the loss of the airplane because it was loaded in excess of the weight permitted in the Operations Limitations as established by the Civil Aeronautics Authority and was therefore in violation of Paragraph 2 of

the General Conditions contained in the policy of insurance which reads as follows:

"2. The aircraft shall be operated at all times in accordance with its Operations Limitations and/or C.A.A. approved Operations Manual, and in accordance with operations authorized as set forth therein."

The Defendants have asserted this defense as an affirmative defense and are therefore required to prove all of the elements of the defense by a preponderance of the evidence.

In connection with this defense you are instructed that you must also consider paragraph 3 of the General Conditions of the policy of insurance, which, insofar as applicable to this defense, reads as follows:

"3. The Assured shall use due diligence and do and concur in doing all things reasonably practicable to avoid any loss or damage under both Sections 1 and 2 of this Certificate and/or Policy."

In considering the defense that the airplane was loaded in excess of the permissible load limit at the time it crashed you must consider all of the evidence presented by both Plaintiff and Defendants to determine whether the Defendants have proven by a preponderance of the evidence that the airplane actually was loaded in excess of its permissible load limit. If you find that the Defendants have not proven by a preponderance of the evidence

that the airplane was loaded in excess of its permissible load limits you must find for the Plaintiff and against the Defendants on this defense.

If you find that the Defendants have proven by a preponderance of the evidence that the airplane was loaded in excess of its permissible load limit you must then consider this fact in connection with Paragraph 3 of the General Conditions of the Policy, quoted in this instruction, and determine whether or not the Defendants have proven by a preponderance of the evidence that the actual loss of the airplane was caused by the overloading. If you find that the Defendants have not proven by a preponderance of the evidence that the actual loss of the airplane was caused by the overloading then you must find for the Plaintiff on this defense.

If you find that the airplane was loaded in excess of its permissible load limits and that the actual loss of the airplane was caused by such overloading then you must further consider Paragraph 3 of the General Conditions and determine whether the Plaintiff could, by the exercise of due diligence and doing all things reasonably practicable, have prevented the loss. In order to find against the Plaintiff in this respect you must find that if the plaintiff, Cordova Airlines, had exercised due diligence in doing and concurring in doing all things reasonably practicable that it could have prevented the loss.

Plaintiff's Proposed Instruction No. 2

The defendants contend, among other defenses, that paragraph 4 of the General Exclusions of the policy of insurance here involved relieves them from liability for payment of the loss of the airplane because it was carrying a quantity of dynamite at the time it crashed in violation of Civil Air Regulations and that the purpose of the flight was therefore unlawful. Paragraph 4 of the General Exclusions insofar as applicable to this defense reads as follows:

"This certificate and/or policy does not cover:

> * * *; the use of the aircraft for any unlawful purpose if with the knowledge and consent of the assured."

This is asserted as an affirmative defense and the burden therefore is on the defendants to prove the material facts to support the defense by a preponderance of the evidence.

In this connection you are instructed that the word "purpose" is defined as:

> "The object; effect, or result, aimed at, intended, or attained." Websters International Dictionary.

You are instructed that the meaning of the word "use" is defined as:

> "The purpose served—a purpose, object, or end for useful or advantageous nature, im-

plying that the person receives a benefit from the employment of the factor involved." Great American Indemnity Co. vs. Solzman, CCA 8th 1954, 213 F(2) 743, 746.

You are also instructed that the policy of insurance here involved in paragraph 8 reads as follows:

"8. Purposes for which aircraft will be used: Private business and private pleasure flying and commercial operations including passenger and freight flights for hire or reward but excluding student instruction."

If you find that the defendants have not proven by a preponderance of the evidence that the plaintiff in attempting to transport dynamite from Iliamna Bay to Big Mountain were using the airplane for an unlawful purpose then you must find for the plaintiff on this defense.

In this connection you are to consider the reason for and the object of the flight, based upon all of the testimony, in order to determine whether the use of the airplane at the time it crashed was for an unlawful purpose and with the knowledge and consent of the assured, Cordova Airline, Inc.

If you find that the defendants have proven by a preponderance of the evidence that in attempting to transport dynamite from Iliamna Bay to Big Mountain the airplane was being used for an unlawful purpose then you must consider whether or not

such use of the airplane was with the knowledge and consent of the plaintiff Cordova Airlines.

In this connection you must consider all of the evidence and determine whether the defendants have proven by a preponderance of the evidence that such use of the airplane was undertaken with the knowledge and consent of responsible officials of the plaintiff Cordova Airlines, Inc.

Plaintiff's Proposed Instruction No. 3

The defendants contend among other defenses that for the flight in question the plaintiff failed to obtain a written waiver from the Civil Aeronautics Authority as required by Civil Air Regulations Part 49 and also failed to obtain written permission from Far West General Agency to make the flight in question.

The policy of insurance reads as follows insofar as applicable to this defense:

"This Certificate and/or Policy does not cover:

"1. Any loss, damage or liability arising from:

* * *

"(c) * * * or any flying in which a waiver issued by the Civil Aeronautics Authority is required unless with the express written consent of Farwest General Agency for Insurers."

In this connection the plaintiff contends that Civil Aeronautics Board order S-712, which has been introduced in evidence as Defendant's Exhibit

A amounts to blanket authority to deviate from Part 49 of the Civil Air Regulations and that in the order portion of this exhibit commencing on page 3 the plaintiff was given blanket authority to carry dynamite on the flight in question and therefore was not required to obtain a specific written waiver from Civil Aeronautics Authority.

In this connection you are instructed that the Civil Aeronautics Act defines "United States" as:

> "United States" means the several states, the District of Columbia, and the several Territories and possessions of the United States, including the Territorial waters and the overlying air space thereof."

The plaintiff contends that the Territory of Alaska was included in the order, that plaintiff was engaged in a charter carriage of dynamite belonging to the United States Air Force from a remote location to a United States Air Force airport at Big Mountain, and needed no specific written waiver from the Civil Aeronautics Authority for the flight.

If you believe that Defendant's Exhibit A contained blanket authority for plaintiff to carry the dynamite without a specific written waiver then you must find for the plaintiff on this defense.

If you believe that Defendant's Exhibit A did not contain blanket authority for the plaintiff to transport the dynamite then you must next consider

paragraph 1 (c) of the policy of insurance quoted above and determine whether the defendants have proven by a preponderance of the evidence that the actual loss of the airplane "arose from" and was "the result of" the failure of the plaintiff to obtain a written waiver from the Civil Aeronautics Authority. In this connection you are instructed that the defendants have stipulated that the dynamite did not explode when the airplane crashed and you must accept this as a fact.

If you find that the loss of the airplane "arose from" or was "the result of" plaintiff's failure to obtain a specific waiver from the Civil Aeronautics Authority and if you further find that plaintiff did not obtain the express written consent of Farwest General Agency, then you must find for the defendants on this defense.

[Endorsed]: Filed June 4, 1958.

[Title of District Court and Cause.]

TRIAL BY JURY CONTINUED

Before the Honorable Harry C. Westover,
District Judge.

Now came the respective parties and their respective counsel as heretofor and it was stipulated Jury in Box.

Motion for directed verdict filed by attorneys for defendants, denied under the rules.

Court instructs Jury.

Bailiffs Oscar Olson and Lee Williams sworn.

At 10:50 o'clock a.m. trial jury retired with their sworn bailiffs to deliberate upon a verdict.

Now at 2:45 o'clock p.m. came the jury, in charge of their sworn bailiffs, came also the plaintiff with Buell A. Nesbett, its counsel, came also the defendant appearing by and through its counsel, David Talbot, and said jury did present, by and through their foreman, in open court, their verdict in the above cause, which is in words and figures as follows, to-wit:

which verdict the Court ordered filed and discharged the jury to report at 10:00 o'clock a.m. of Monday June 9, 1958.

[Title of District Court and Cause.]

HEARING ON MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR MOTION FOR NEW TRIAL

Before the Honorable Harry C. Westover,
District Judge.

Now at this time hearing on motion for Judgment notwithstanding the verdict or motion for new trial came on regularly before the Court. Arthur David Talbot present for and in behalf of the defendant; Buell A. Nesbett, present for and in behalf of the plaintiff.

Arthur David Talbot, for and in behalf of the defendant moves for permission to submit written order amending motion to read as follows:

Motion for Judgment notwithstanding the verdict And motion for new trial. Motion granted.

Argument to the Court was had by Arthur David Talbot for and in behalf of the defendant.

Argument to the Court was had by Buell A. Nesbett, for and in behalf of the plaintiff.

Closing argument to the Court was had by Arthur David Talbot, for and in behalf of the defendant.

Motions denied.

Entered June 20, 1958.

[Title of District Court and Cause.]

VERDICT No. 1

We, the jury, duly impaneled and sworn to try the above-entitled case, do find for the plaintiff and against the defendants, and we do find that the plaintiff is entitled to recover the sum of $15,200.00 from the defendants.

Dated at Anchorage, Alaska, this 4th day of June, 1958.

/s/ KYLE I. TURNER,
Foreman.

[Endorsed]: Filed and entered June 4, 1958.

[Title of District Court and Cause.]

DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT, OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

To: Buell A. Nesbett, Esq., Attorney for Plaintiff, First National Bank Building, Anchorage, Alaska.

Please Take Notice that the undersigned will bring the following motion on for hearing before this Court on the 16th day of June, 1958, at 10:00 a.m. on said day, or as soon thereafter as counsel can be heard.

Defendants move the Court to set aside the verdict and any judgment entered thereon and to enter judgment for the defendants, in accordance with their motion for a directed verdict, which was submitted at the close of all the evidence at the trial, or, in the alternative, for a new trial.

Defendants' motion to set aside the verdict and any judgment entered thereon and for judgment in accordance with defendants' motion for a directed verdict is made upon the grounds set forth in the defendants' aforementioned motion for a directed verdict, which written motion, including the grounds set forth therein, is hereby repeated and realleged, with the same force and effect as if herein repeated and set forth at length.

If, for any reason, defendants' motion for judgment notwithstanding the verdict is denied, then, and in that event, defendants hereby move the Court for a new trial, by reason of the following erroneous, misleading and confusing jury instructions given by the Court:

1. "If you find that the defendants have not proven by a preponderance of the evidence that the actual loss of the airplane was caused by the overloading then you must find for the plaintiff on this defense."

2. "If you find that the defendants have not proven by a preponderance of the evidence that the plaintiff in attempting to transport dynamite from Illiamna Bay to Big Mountain were using the airplane for an unlawful purpose then you must find for the plaintiff on this defense.

"In this connection you must consider all of the evidence and determine whether the defendants have proven by a preponderance of the evidence that such use of the airplane was undertaken with the knowledge and consent of the plaintiff Cordova Airlines, Inc.

"In this connection you are to consider the reason for and the object of the flight, based upon all of the testimony, in order to determine whether the use of the airplane at the time it crashed was for an unlawful purpose and with the knowledge and consent of the assured, Cordova Airlines, Inc."

3. "In this connection the plaintiff contends that Civil Aeronautics Board order S-712, which has been introduced in evidence as exhibit B amounts to blanket authority to deviate from part 49 of the Civil Air Regulations and that in the order portion of this exhibit commencing on page 3 the plaintiff was given blanket authority to carry dynamite on the flight in question and therefore was not required to obtain a specific written waiver from Civil Aeronautics Authority."

4. "If you believe that exhibit B contained blanket authority for plaintiff to carry the dynamite without a specific written waiver then you must find for the plaintiff on this defense.

"If you believe that exhibit B did not contain blanket authority for the plaintiff to transport the dynamite then you must next consider paragraph 1c of the policy of insurance quoted above and determine whether the defendants have proven by a preponderance of the evidence that the actual loss of the airplane 'arose from' and was 'the result of' the failure of the plaintiff to obtain a written waiver from the Civil Aeronautics Authority. In this connection you are instructed that the defendants have stipulated that the dynamite did not explode when the airplane crashed and you must accept this as a fact.

"If you find that the loss of the airplane 'arose from' or was 'the result of' plaintiff's failure to

obtain a specific written waiver from the Civil Aeronautics Authority and if you further find that plaintiff did not obtain the express written consent of Farwest General Agency, then you must find for the defendants on this defense."

5. The Court further erred in instructing the jury to resolve all ambiguities in the certificate of insurance against the defendants. There is no ambiguity in the three provisions of the certificate of insurance relied upon by defendants to support their three affirmative defenses and, if the Court believed that there were any ambiguities in said provisions, then the Court had a duty to interpret and construe said provisions, and to instruct the jury accordingly.

JAMES E. FISHER,
BOYKO, TALBOT & TULIN,

By /s/ ARTHUR D. TALBOT,
Attorneys for Defendants.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 9, 1958.

In the District Court for the District of Alaska
Third Division

No. A-12,349

CORDOVA AIRLINES, INC.,

Plaintiff,

vs.

UNDERWRITERS AT LLOYD'S OF LONDON, VICTORIA INSURANCE COMPANY, LTD., ORION INSURANCE COMPANY, LTD., EAGLE STAR INSURANCE COMPANY, LTD.,

Defendants.

JUDGMENT

This case came on for trial commencing June 2, 1958, before the Honorable Harry C. Westover, Federal District Judge, sitting at Anchorage, Alaska, the plaintiff, Cordova Airlines, Inc., being represented by its president, Merle Smith and Buell A. Nesbett, its attorney, and the defendants being represented in court by their attorneys, Arthur D. Talbot and James Fisher; a jury of twelve persons was regularly impaneled and sworn to try the cause; oral testimony and documentary proof was introduced and admitted on behalf of the plaintiff and defendants, whereupon the Court instructed the jury on the law concerning the issues involved and counsel for both sides having argued the matter to the jury, the jury thereupon retired to consider its verdict at the close of the trial on June 4, 1958.

The jury returned into Court on the 4th day of June, 1958, with a verdict which was handed to the Court in the presence of the jury and found to be a verdict in favor of the plaintiff, reading as follows:

> "Verdict No. 1.
>
> "We, the jury, duly impaneled and sworn to try the above-entitled case, do find for the plaintiff and against the defendants, and we do find that the plaintiff is entitled to recover the sum of $15,200.00 from the defendants.
>
> "Dated at Anchorage, Alaska, this 4th day of June, 1958.
>
> "KYLE I. TURNER,
> "Foreman."

Wherefore by virtue of the law and by reason of the premises aforesaid it is hereby

Ordered, Adjudged and Decreed that judgment be and it is hereby given in favor of the plaintiff, Cordova Airlines, Inc., against the defendants, Underwriters at Lloyd's of London, Victoria Insurance Company, Ltd., Orion Insurance Company, Ltd., Eagle Star Insurance Company, Ltd., in the sum of Fifteen Thousand Two Hundred Dollars ($15,200.00) plus interest at the rate of six per cent (6%) per annum from the 1st day of March 1956, until paid, and that plaintiff shall have and recover from the said defendants plaintiff's costs in the sum of Sixty-five Dollars Ten Cents ($65.10)

and an attorney's fee in the sum of Eight Hundred Two Dollars ($802.00).

Dated at Anchorage, Alaska, this 12th day of June, 1958.

/s/ HARRY C. WESTOVER,
Federal District Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed and entered June 12, 1958.

[Title of District Court and Cause.]

ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT AND IN THE ALTERNATIVE FOR A NEW TRIAL

Hearing on defendant's motion for judgment notwithstanding the verdict and in the alternative for a new trial came on regularly for hearing before the Honorable Harry C. Westover, Federal District Judge, at 1:30 o'clock p.m. June 20, 1958. The plaintiff was represented by their counsel Buell A. Nesbett and the defendants by their counsel, Arthur D. Talbot, Esq. After hearing argument by both counsel the Court thereupon

Ordered that defendants' motion for judgment notwithstanding verdict and in the alternative for a new trial both be denied.

Dated at Anchorage, Alaska, this 30th day of June, 1958.

/s/ HARRY C. WESTOVER,
Federal District Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed and entered June 30, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the above-named defendants, and each of them, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on June 12, 1958.

BOYKO, TALBOT & TULIN,

By /s/ ARTHUR D. TALBOT,
Attorneys for Appellants.

Service of Copy acknowledged.

[Endorsed]: Filed July 17, 1958.

[Title of District Court and Cause.]

MOTION FOR ORDER SETTING AMOUNT OF SUPERSEDEAS BOND

Defendants move the Court for an order setting the amount of a supersedeas bond to be filed herein

by defendants in connection with their appeal to the United States Court of Appeals for the Ninth Circuit.

BOYKO, TALBOT & TULIN,

By /s/ ARTHUR D. TALBOT,
Attorneys for Defendants.

ORDER

The above motion having duly come on for hearing on the 25th day of August, 1958, and due deliberation having been had thereon, it is hereby

Ordered that the defendants may present to the Court for its approval, pursuant to Rule 73(d) of the Federal Rules of Civil Procedure, a supersedeas bond, to be approved by the Court, in the sum of $23,000.00.

Dated at Anchorage, Alaska, this 25th day of August, 1958.

/s/ J. L. McCARREY, JR.,
District Judge.

Service of Copy acknowledged.

[Endorsed]: Filed and entered August 25, 1958.

[Title of District Court and Cause.]

APPELLANTS' STATEMENT OF POINTS ON APPEAL

Appellants intend to rely upon the following points on their appeal:

1. The verdict was contrary to the weight of the evidence.
2. The trial judge erred in denying defendants' motion for a directed verdict.
3. The trial judge erred in denying defendants' motions for judgment notwithstanding the verdict and for a new trial.
4. The trial judge erred in giving the erroneous, misleading and confusing jury instructions set forth in detail in defendants' motion for a new trial.
5. Defendants are entitled to judgment against plaintiff, as a matter of law, upon the grounds set forth in defendants' written motion for a directed verdict, and in the argument which was had before the trial judge on June 20, 1958, on defendants' motion for judgment notwithstanding the verdict and for a new trial, transcript, pages 296-318.

BOYKO, TALBOT & TULIN,

By /s/ ARTHUR D. TALBOT,
Attorneys for Defendants-Appellants.

Service of Copy acknowledged.

[Endorsed]: Filed November 28, 1958.

In the District Court for the District of Alaska
Third Division

No. A-12,349

CORDOVA AIRLINES, INC., a Corporation,

Plaintiff,

vs.

UNDERWRITERS AT LLOYD'S OF LONDON, ET AL.,

Defendants.

DEPOSITION OF MERLE K. SMITH

Appearances:

BUELL A. NESBITT,
Attorney for Plaintiff.

ARTHUR D. TALBOT &
JAMES E. FISHER,
Attorneys for Defendants.

Pursuant to Stipulation, the deposition of Merle K. Smith was taken before Bonnie T. Brick, Notary Public in and for the Territory of Alaska and Official Court Reporter, at the offices of Boyko, Talbot & Tulin, attorneys at Law, Turnagain Arms Building, Anchorage, Alaska, on the 24th day of May, 1958, at the hour of 2:00 o'clock p.m.

Proceedings

Mr. Talbot: This deposition was originally set for 9:00 a.m. on Monday, May 26, 1958, but by

stipulation of counsel, the time has been changed to 2:00 p.m. on Saturday, May 24th.

MERLE K. SMITH

being first duly sworn upon oath, testifies as follows on

Direct Examination

By Mr. Talbot:

Q. Mr. Smith, you will have to bear with me a little bit in some of the questions that I will ask you because of my unfamiliarity with the aircraft industry which you are familiar. Some of the questions may be difficult for you to answer; for that reason, I may not make sense to you, but we will try to do the best we can. A. Okay.

Q. Will you state your full name, sir?

A. Merle K. Smith.

Q. And where do you live, Mr. Smith?

A. Cordova is my home.

Q. And I believe you are the president of Cordova Airlines, Inc.? A. I am.

Q. The plaintiff in this action? A. Yes.

Q. How long have you been president of the Cordova Airlines? [2*]

A. Since 1939 except for an eighteen month period during the war.

Q. Are you a pilot yourself, sir?

A. I am.

Q. How long have you been a pilot?

A. 1928.

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Deposition of Merle K. Smith.)

Q. Could you tell us roughly how many hours' experience you have flying as a pilot?

A. Approximately nine thousand.

Q. Do you recall, Mr. Smith, that on December 18th, 1955, at Big Mountain near Lake Iliamna, there was a crash of one of Cordova Airlines planes? A. I do.

Q. And that was what kind of a plane?

A. It was a Cessna 180.

Q. The pilot's name was?

A. Herbert N. Haley.

Q. How long had Cordova Airlines owned that particular plane?

A. I believe we bought that airplane in '53.

Q. Did Cordova buy it new?

A. No, it was second hand.

Q. When was the airplane built, if you know?

A. Well, I believe it was about six months old when we bought it. It would be early in '53. I think it was a '53 model; I am not just definite on that.

Q. What kind of work was this plane engaged in at the time of [3] the crash?

A. Well, it was on a contract to Morrison-Knudsen, Western Electric Company and it was engaged in whatever type of flying that they required him to do.

Q. Was that what's known as a charter contract?

A. Contract—is what we referred to it as a contract.

(Deposition of Merle K. Smith.)

Q. What was the duration of that contract?

A. That, I have forgotten. The starting date, I think, was November 1st.

Q. Could it have been a ninety day contract?

A. It could have, yes.

Q. But in any event, the aircraft had been engaged in this service for some period of time prior to the crash, is that correct?

A. Yes, in excess of thirty days, I believe.

Q. Now, concerning movements of that aircraft during the period that it was chartered to Morrison-Knudsen, what control, if any, did Cordova Airlines have over the question of where the aircraft went and what work it performed?

A. Well, we had no control. That was up to Morrison-Knudsen who sent it where they wanted it to and so on, you see. Our control was through the pilot.

Q. And the pilot was your employee?

A. Yes.

Q. And the pilot was paid by you? [4]

A. Yes.

Q. How long had Cordova employed this particular pilot?

A. Since 1942, outside of occasional furloughs and he was out sometime during the war there for a year or two, but he was originally hired in '42 and then would work for us whenever we needed him, which was pretty much all the time.

(Deposition of Merle K. Smith.)

Q. Does Cordova Airlines own and operate any Cessna 180's at this time?

A. Yes, we have two.

Q. Did you own any others in December of 1955?

A. Yes, we did. We had, I believe we owned a total of three then. However, I don't believe one of them had been delivered yet. It was still enroute from the factory.

Q. Had you owned other Cessna 180's before 1955?

A. No, only the one that crashed. We owned that before '55.

Q. And when you acquired that in 1953, that was the first 180 that you acquired? A. Yes.

Q. When I say "you," I mean Cordova Airlines.

A. Yes.

Q. Well, in operating the Cessna 180's, Mr. Smith, can you tell me what records Cordova Airlines customarily keeps with regard to individual Cessna 180 aircraft?

A. Well, you have your log books.

Q. Now, with reference to log books, would you describe a log [5] book for me a little bit and tell me what goes in one?

A. Well, our log books are something about the size of this tablet. It's a 7x14 and made in duplicate and you have your time there and you carry your time forward in each column from day to day. You retain the second copy, which is a yellow copy, at all times in the log book and the white

(Deposition of Merle K. Smith.)

copy is retained in the maintenance shop and they're numbered in serials and you must not destroy them.

Q. Are the copies made by means of carbon paper? A. Yes.

Q. And whose duty is it to keep the log?

A. It's the pilot's.

Q. Do you know whether or not a log was kept on the Cessna 180 that crashed?

A. Yes, there was a log kept.

Q. Do you know where the log is now?

A. I don't really know where that log is right at the minute, I don't.

Q. Do you recall ever having seen that log?

A. I did see that log in the CAB office.

Q. Where?

A. In Anchorage in the Loussac-Sogn Building.

Q. Which copy of the log was it that you saw?

A. Well, it was just a whole book.

Q. I see, and then your maintenance department would have the [6] white copy of the log?

A. Yes, if the pilot had mailed those into him. See, the maintenance for this particular airplane is in Cordova and he would mail those in periodically.

Q. Would your maintenance department in Cordova have at the present time the white copy of the log on this aircraft?

A. I just don't know.

Q. Would you be willing to check with your

(Deposition of Merle K. Smith.)

maintenance department in Cordova, say on Monday, and see if that document is available?

A. Yes.

Q. Can you tell me how the CAB happened to get the yellow log on this aircraft?

A. Well, they always make the inspection after a crash and take all the records and usually including the records that the operator has on hand.

Q. Do they customarily return those records when they have completed their investigation?

A. I think they do. After they're through with them, if you ask them for it, I think they do.

Q. Now, was any portion of the log for this aircraft—strike that. Did Pilot Haley have the yellow log with him when he crashed?

A. The log book I seen, yes, had been with him when he crashed. It was in a metal binder. [7]

Q. Was it seriously damaged in the crash?

A. Well, yes, the metal was rolled up as we refer to it as a pretzel, just kind of rolled up.

Q. Were the entries still legible?

A. I believe maybe they were.

Q. Did you actually look at the log yourself?

A. Not too much, not—I mean I never tried to determine whether anything was readable or not—just general discussion.

Q. You did, I am sure, examine the log however with respect to entries that Pilot Haley made on the day of the crash, did you not?

A. No, I don't think I did.

(Deposition of Merle K. Smith.)

Q. Now, I believe you said that the time would be entered in the log? A. The flight time, yes.

Q. By flight time, you mean the actual time the aircraft is in the air?

A. Well, yes, from the time—you have flight time and you have block time. Your block time starts from the time you start the motor and your flight time starts from the time your wheels leave the ground. That is usually entered—or times off, they write down their stuff like that.

Q. And those are listed separately in the log?

A. Well, yes.

Q. Now, what ever information goes in the [8] log?

A. Well, on the aircraft log, the pilot writes what we call squawks, which is, if you have a rough "mag"—magneto, and if the radio isn't working or needs some repair, he writes that and then when it's repaired by an A & E, or fixed, why he signs off and initials who done it.

Q. For the record, what do you mean by an "A & E"?

A. Licensed airplane and engine mechanic. A & E means aircraft and engine.

Q. And who licenses these fellows?

A. The CAA.

Q. Now, does the pilot also insert in the log a record of what trips he makes and what he carries?

A. From and to—like from one point to a point

(Deposition of Merle K. Smith.)

and on. He inserts that. He don't on the aircraft log—they do not, I don't think, insert the load.

Q. Does—you don't think he inserts number of passengers or amount and type of cargo?

A. I believe maybe there is a column in there for number of passengers and there could be a freight column on there, too. It's very possible that there is a——

Q. Now, in addition to the log book, what other records are maintained by Cordova in respect of a Cessna 180?

A. Well, you have your log books and all your repairs and alterations which are a CAA form that you have.

Q. Is that form called a Form 337? [9]

A. Yes, that is the maintenance form.

Q. That is the designation of it? A. Yes.

Q. Do you keep files of those forms?

A. Yes.

Q. Does Cordova have a file of Form 337's on this particular aircraft? A. Yes.

Q. Can you tell me where that is?

A. Well, it's either in my file or my attorney has it.

Q. Have you seen that file recently?

A. Not recently. I mean, the last six months which—we had, say, sometime previous to that, yes.

Q. Where was it when you saw it last?

A. I believe it was in my attorney's office.

(Deposition of Merle K. Smith.)

Q. Was the file of Form 337's complete, that is, it showed repairs and maintenance right up to the end on that aircraft? A. Yes.

Q. What other records did you keep on this particular aircraft?

A. Well, that is about all you are required to keep is your log books which are supposed to give you a complete maintenance record and flight record and then your CAA forms like your 337's and for repairs and alterations and then forms on your motor overhauls and your motor changes and stuff like that, which is also 337. [10]

Q. Well, in addition to Form 337's, and log, are there any other records that Cordova kept on this aircraft?

A. Not—I don't think so. I don't think we keep any other records on the maintenance and the operation of the aircraft; that is about all we keep.

Q. Very well. Now, on December 18, 1955, the day of the crash, do you know what work this aircraft did for Morrison-Knudsen?

A. Do I know now what it was doing?

Q. Yes.

A. I do know now what it was doing.

Q. What was it doing?

A. According to my information, it was flying from what we refer to as Pile Bay to Big Mountain.

Q. Where is Pile Bay?

A. Well, that is at the head of Iliamna Lake,

(Deposition of Merle K. Smith.)

which is at the end of the portage, where the portage—across from Cook Inlet to Iliamna Lake.

Q. Was it carrying cargo or passengers on this date?

A. My information is it was carrying cargo.

Q. What kind of cargo? A. Dynamite.

Q. What kind of dynamite, if you know?

A. I don't know.

Q. Did you ever examine the scene of this crash?

A. I didn't, no. [11]

Q. Do you have any information concerning how this dynamite was packed?

A. I don't know.

Q. Do you have any information concerning how much dynamite was being carried?

A. I don't.

Q. How many trips did the aircraft make that day?

A. I believe that my representative told me that they made—that he was on his second trip for the day. I believe that, now, I don't really know. It might have been his first trip.

Q. Do you know where the pilot—at what point the pilot started, when he commenced that day's work, was he at Big Mountain, or, was he at Pile Bay or someplace else?

A. I have heard that he stayed the night before at Big Mountain.

Q. Where did the Pilot Haley obtain gasoline for his plane?

(Deposition of Merle K. Smith.)

A. Well, I have been told that he gassed at Big Mountain the night before.

Q. Could you tell us who told you that, if you remember?

A. Well, I think it was my representative down there, or the CAA who kind of reconstructed his past twenty-four hours alive, or the people of Iliamna advised them, or at Big Mountain advised them that he had stayed there the night before.

Q. And that he had gassed up the night before?

A. Yes, I think somebody said they had seen him gassing. [12]

Q. Do you know whether or not when he gassed up he filled his tanks?

A. I don't really know that. We tried to determine that, but there was no information that we could ever find just what he had done.

Q. Did Cordova have any policy about whether or not the pilot, gassing up under circumstances of this kind, taking into account the weather and time of year, would fill—normally fill his tanks completely?

A. No, we required them to be able to go to their destination plus forty-five minutes of additional gas. In other words——

Q. So, that if he had less than that amount of gasoline, that is, enough to go to his destination plus forty-five minutes—— A. Yes.

Q. (continuing): ——he would he would then have been in violation of your company rules?

(Deposition of Merle K. Smith.)

A. Would you repeat that, please?

Q. I am putting words in your mouth a little bit here.

Mr. Nesbett: I will object to the leading nature of the question.

Mr. Talbot: For the record, I will state, of course, that Mr. Smith is president of the Plaintiff Corporation and therefore, I feel, under the rules, that I have the right to lead him. However, you should, as you have, note Mr. Nesbett's objection. I will withdraw that question any way. [13]

Q. (By Mr. Talbot): To your knowledge, does the CAA have any regulations about how much, which would affect the amount of gasoline which Pilot Haley should have had on board when he started out his first trip on this day?

A. I don't believe there is any CAA regulations on small aircraft regarding the amount of gas.

Q. Do you know whether the Pilot Haley had been engaged in transporting dynamite from Pile Bay to Big Mountain on days previous to the day of the crash?

A. Did I know it then when the airplane was cracked up?

Q. No, do you know it now?

A. Yes, I know it now, yes.

Q. Did this aircraft have any ropes or lashing or other means of tying down the cargo?

A. Well, yes, uh-huh.

(Deposition of Merle K. Smith.)

Q. Do you know whether the cargo was tied down at the time of the crash?

A. No, I don't.

Q. Do you know whether it had been tied down at the beginning of that flight?

A. No, I don't.

Q. What kind of landing gear did this Cessna 180 have on it when Cordova bought it?

A. We—when we actually purchased the airplane, it was on floats. [14]

Q. Then was some other type of landing gear subsequently installed?

A. Yes, we got the landing gear and the wheels and I believe we had it on skis and then we had it on ski wheels.

Q. What kind of landing gear was on it when it crashed?

A. It was what we call a combination ski wheels, a Federal ski wheels.

Q. Is Federal the name of the company that manufactures that kind of gear? A. Yes.

Q. Is that a standard authorized landing gear for Cessna 180?

A. Yes, the ski wheels are an approved ski wheel.

Q. The particular ski wheel that was on the aircraft was an approved one? A. Yes.

Q. When was the ski wheel landing gear installed?

A. Well, that was installed just prior to the

(Deposition of Merle K. Smith.)

airplane's departure from Cordova to Bristol Bay or to Iliamna.

Q. Just before it started this job for M-K?

A. Yes.

Q. I have never seen a ski wheel arrangement. Would you describe for us what sort of landing gear it is?

A. Well, you have your standard wheels that come on the airplane and then you have your skis with the control in the cockpit that the pilots can, if they want to, land on snow or ice and use his skis. He pumps them down so that the skis protrude [15] below the wheels and then he—when he wants to land on a straight hard runway, he can pump them up, you see, and that's the term ski wheels.

Q. Can you tell us how much weight is added to the weight of the aircraft, empty, by the addition of this sort of ski wheel arrangement over and above the normal wheels?

A. By gosh, I just can't tell you that.

Q. Can you tell us approximately?

A. Well, I imagine it would be—the skis and installation would weigh someplace—I will just make a guess between fifty and one hundred and ten pounds.

Q. When the skis were added to the wheels, if I may put it that way, was this alteration approved by CAA?

A. As far as I know, it was. I happened to be

(Deposition of Merle K. Smith.)

in Cordova during that installation and it was installed exactly by the blueprints and we did part of it at night, in the evening, and I worked on it a little myself. I was around there.

Q. Who furnished the blueprints?

A. They come with the skis from the factory.

Q. And do you remember who the mechanic was that actually installed them?

A. Yes, our shop man there, Bob Albers, Robert Albers.

Q. Is he still available?

A. Yes, he still has the same capacity with the company.

Q. In Cordova? [16] A. Yes.

Q. What would the normal procedure be for Mr. Albers by way of getting CAA approval after he had completed installing the skis?

A. Well, he makes out his 337 and signs it off as having done the work in the approved fashion as approved by the CAA and the blueprints and then it's presented to the CAA for their approval or signature.

Q. Who, specifically, in CAA would it be presented to?

A. Well, we are assigned certain inspectors and they change and I believe at that time, that we were assigned Mr. Rodgers.

Q. Did Mr. Rodgers live at Cordova?

A. No, he's Anchorage.

(Deposition of Merle K. Smith.)

Q. And how would the 337 have been submitted to Mr. Rodgers—by mail?

A. No, in this particular case, the airplane was flown to Anchorage on a ferry and presented thru our people at Anchorage, our maintenance people at Anchorage. They presented the papers and the airplane to Mr. Rodgers for inspection.

Q. Would the CAA inspector in this case, Mr. Rodgers, have indicated his approval on the Form 337?

A. With scheduled airlines, they have certain people sometime that can do that, you see; under certain circumstances, some of your top maintenance men, your inspectors, your superintendent maintenance can do that. It's strictly up to our designated maintenance inspector, which in this case was Mr. Rodgers. [17]

Q. Mr. Rodgers would determine then who the individual was that would make the final inspection?

A. Well, he would determine beforehand, probably several months before, who could sign off the 337's for us.

Q. I see. Then, the approval or disapproval of the CAA on this particular Form 337 would appear right on the form itself, would it not?

A. No.

Q. Well, I thought you said—I may have misunderstood you, but I thought you said that the Form 337 is submitted by your mechanic and then

(Deposition of Merle K. Smith.)

the Form 337 is signed off by the designated CAA official? A. That is right.

Q. So——

A. But, you also have people in your organization—sometimes he will say you can handle that yourselves.

Q. In other words, he might say Mr. Smith can approve it, for example?

A. Well, not on the spur of the moment like that. You see, what they do is set up within your organization and prove, and give you approval—certain people that can sign something off, you see, that——

Q. I see. Did you have such a person in your organization who had been designated by CAA at that time?

A. Well, I don't really know. I am sure we had, or if we didn't [18] have, why, it was—there was something worked out with Mr. Rodgers there on it at that time. I didn't come over to Anchorage; I stayed in Cordova and I knew the airplane landed here with all the paper work and our maintenance people here took it over and went through whatever steps were necessary.

Q. You have then, a maintenance force here in Anchorage as well as at Cordova?

A. Yes. The maintenance people in Cordova handle small aircrafts, Cessna 180, or bush operations. It's all out of Cordova; and large aircrafts here. If you have something going on in Anchor

(Deposition of Merle K. Smith.)

age, why, they handle it for the maintenance people in Cordova, you see.

Q. Now, Mr. Smith, does CAA, by regulation, set a legal load limit on aircraft of this kind?

A. Yes, they have a gross weight and empty weight and useful weight. Your gross weight is your total weight, including your—everything.

Q. Gross weight then is cargo, pilot, gasoline and all? A. That's right.

Q. And what is net weight?

A. Your net weight is usually your empty weight, what the airplane weighs without anything in it, only just air frame and engine——

Q. Well, wouldn't——

A. ——radios and such all.

Q. Equipment would be included? [19]

A. Yes, that's right.

Q. How about gasoline? A. No.

Q. No gasoline included in the net weight?

A. No.

Q. Net weight then assumes absolutely empty gas tanks? A. That's right.

Q. How much gasoline does a—strike that. How much gasoline did the tanks have, this particular Cessna 180 hold at the time of the crash?

A. I believe that those are thirty-six gallon tanks and there is two of them. That would make a total of seventy-two. I could be wrong on that. There could be two 18 gallon tanks, but some place or other it sticks in my mind there's thirty-six gallons there some place or other.

(Deposition of Merle K. Smith.)

Q. Now, had any change or modification been made in the gas tanks or the gas carrying capacity of this plane since it came from the factory?

A. No.

Q. No additional gas tanks had been added?

A. No tanks added.

Q. None had been taken out?

A. None taken out.

Q. My information, Mr. Smith, is that the total capacity is sixty gallons—one of us is in error but it's a point which I am sure can be checked, but——

A. Well, you could be right. There's so many of those that—like your Widgeons and everything operating. I just don't remember. It could be two 30 gallon tanks.

Q. Let's assume that it is two 30 gallon tanks with a total gasoline capacity of sixty gallons. Of that sixty gallons, how much would be usable in normal flight?

A. I believe you can get right down to the last drop in normal flight on the Cessna 180.

Q. You mentioned that Cordova is a scheduled airline? A. Yes.

Q. What do you mean by that, sir?

A. Well, we are certificated for mail, passengers, freight, over certain routes and certificated to do other sort of charter and contract work and they call them "skeds" and "non-skeds" and so on. We are referred to as a certificated scheduled airline.

Q. How long have you been a scheduled airline?

(Deposition of Merle K. Smith.)

A. Well, practically from the day that we were first incorporated, 1934, but we came under the present schedule laws in 1938—the Civil Aeronautics Act in 1938.

Q. And you have been under that same law and regulation ever since? A. That's right.

Q. Now, referring to the year 1955, are you familiar with the fact that the CAA then had in effect regulations concerning the carrying of explosives by aircraft of the scheduled airlines?

A. The CAB is the one that makes those.

Q. Those were CAB regulations?

A. Yes, I am aware of that.

Q. Was the carrying of dynamite by this plane on the day in question under the regulations then in force, in violation of CAA regulations with respect to the carriage of explosives?

A. The regulations in force—it was not in violation.

Q. It was not in violation? A. No.

Q. Had those regulations been changed shortly before the crash or do you know?

A. Well, I'm sorry, I don't even know that order number, but it was, I'd say, several months, at least two months, maybe, before that that they came out.

Mr. Talbot: Off the record.

(Thereupon, an off-the-record discussion was was had.)

Mr. Talbot: On the record.

Q. (By Mr. Talbot): Mr. Smith, I hand you a

(Deposition of Merle K. Smith.)

copy of a special civil regulation No. SR-417 of the United States Civil Aeronautics Board and ask you if that is the regulation or order to which you referred? [22]

A. No, that isn't the one that I am talking about. This was the subsequent order to the one that I'm referring to.

Mr. Talbot: Off the record.

(Thereupon, an off-the-record discussion was had.)

Q. (By Mr. Talbot): Mr. Smith, I hand you a certified copy of CAB Order No. S-712, dated December 2, 1955, and ask you if that is the order to which you refer?

A. Yes, uh-huh, this is the one.

Q. Is it your understanding then that prior to the promulgation of this order No. S-712, that the carrying of explosives was prohibited by CAB, but tha this order made it possible for you to carry explosives under the terms of the regulation—of the new regulation?

A. This order clarified that as far as we were concerned, it clarified it. Before that, the—previous to this order, why, it was not—I don't think—in violation, but there seemed to be a feeling that there was no regulation.

Q. Prior to—— A. Prior to this order.

Q. Had your airline flown explosives prior to this order?

(Deposition of Merle K. Smith.)

A. Oh, a small amount, yes. This order came about thru the Air Force.

Q. Prior to the promulgation of this Order No. S-712 had your airline ever applied to CAB or CAA for special permit to carry explosives on a given flight? A. That, I don't know.

Q. Did Cordova Airlines apply for a special permit to carry explosives on the flight on which Pilot Haley crashed? A. No.

Q. Did Cordova Airlines apply for a special permit for carrying explosives on the previous flights that Pilot Haley had made for M-K carrying explosives from Pile Bay to Big Mountain?

A. We had not. We didn't even know he was hauling dynamite.

Q. It's my understanding, Mr. Smith, that you had a policy of insurance on this aircraft, is that correct? A. Yes.

Q. How much was it insured for?

A. I think the policy was the aircraft was insured for $15,000.00, with some possible deductions; I don't remember what they were.

Q. Who arranged to secure this insurance? That is, who in Cordova Airlines arranged it?

A. Our office manager.

Q. What's his name?

A. Joe Kiel. He's no longer with us now.

Q. Where does he live now?

A. That, I'm not positive. He worked for Federal Electric for a while and then he moved Stateside and I don't know just where he went. [24]

(Deposition of Merle K. Smith.)

Q. Do you expect to have Mr. Kiel as a witness at this trial?

A. I haven't heard of it. To clarify my previous statement there, he arranged for all the policies. They were all brought up and talked over with me before we actually bought the insurance, so to speak.

Q. The terms were discussed with you?

A. That's right, and good and bad points of a policy and the cost and so on.

Q. Do you remember if you participated particularly in the placing of this particular policy of insurance?

A. Well, we were insuring a whole fleet at that time and we took them on a, you know, just as a group coverage, you might say. We had every airplane we owned insured at the same time.

Q. Do you know how Mr. Kiel went about placing this particular insurance?

A. Yes, we contacted different brokers and got what we call quotes from them, which they in turn, I guess, got from the underwriters.

Q. Did you get a quote from a firm here in Anchorage known as Coffey-Simpson?

A. Yes, we did.

Q. And was this insurance eventually placed thru them? A. It was.

Q. Did you personally have any discussions with any official or employee of Coffey-Simpson concerning the terms and provisions of this particular policy of insurance—that is, you——

(Deposition of Merle K. Smith.)

A. Oh, yes, I talked to Louie Simpson quite a bit about it.

Q. Did you talk to anybody else in the insurance business? A. Other than Coffey-Simpson?

Q. Yes.

A. Oh, yes, we had a broker from the States.

Q. Who was that?

A. That was Don Flowers — Gailbreath & Flowers.

Q. Are you familiar with an insurance firm called Northwest—strike that. Are you familiar with an insurance firm called Far West General Agency of Seattle?

A. I'm not too familiar with Far West. D. K. McDonald, I think, was the people that I was familiar with, who might have been Far West, and I understand they were.

Q. But in any event, you didn't talk to anybody from D. K. McDonald or from Far West?

A. No, we only talked with the local broker.

Q. Cordova Airlines has sued Far West General Agency, Mr. Smith, as a defendant in this action. Please tell us in your own words just what the nature of your claim is against Far West Agency?

A. Well, we feel that we should have the amount of our claim; in other words, what we had insured it for. [26]

Q. Do you feel that you were issued and received the insurance coverage that you ordered?

A. Well, at the time that I—I mean, I have

(Deposition of Merle K. Smith.)

always felt that the insurance policy was what we wanted and what we discussed about.

Q. You just wished that the underwriters would pay for the loss in accordance with the terms of the policy, is that a fair statement?

A. Well, the terms of the policy, the way you interpret them, and the way I interpret them could be different.

Q. But, the way you interpret the policy, you are entitled to be paid? A. That's right.

Q. But, you don't find any fault with the policy itself; that is, with the way it's written or the provisions it contains.

Mr. Nesbett: I object to the leading nature of the question.

Mr. Talbot: Off the record.

(Thereupon, an off-the-record discussion was had.)

Mr. Talbot: On the record.

Q. (By Mr. Talbot): Would you please answer the question, Mr. Smith?

Mr. Nesbett: Before you answer, I will object further on the ground it was not a question; it was simply a statement to the witness.

Mr. Talbot: May I have the question read back, please?

(Thereupon, the Court Reporter, read back the question on Page 27, Line 14.)

Mr. Talbot: I withdraw that question.

Q. (By Mr. Talbot): Mr. Smith, is there any

(Deposition of Merle K. Smith.)

term or provision that you ordered or coverage which you ordered which was not contained in the policy which you actually received?

A. Well, from the way I interpreted it, no.

Q. Do you remember seeing this particular policy before the crash? A. No, I don't.

Q. You have, of course, insured several other Cessna 180's, have you not? A. Yes.

Q. Have you examined the policies with regard to any of those aircraft?

A. No, I don't think so; not the fine print.

Q. At the time this insurance was placed, Mr. Smith, was it not your understanding that the aircraft had to be operated in accordance with CAA regulations applicable to it; otherwise, this would affect the insurance coverage?

A. Well, that is generally understood you operate within the prescribed regulations.

Q. And that if you don't operate within regulations, it voids your insurance. [28]

Mr. Nesbett: I will object to the leading nature of the question which is not a question and on a further ground, it's a statement to the witness and not a question.

Mr. Talbot: May I have the question read back, please?

(Thereupon, the Court Reporter read back the question on Page 28, Line 24.)

Mr. Nesbett: I object on the further ground that it calls for a conclusion of the witness with respect to the very issues before the Court, and that he is

(Deposition of Merle K. Smith.)

incompetent to answer the interpretation of the policy. Go ahead.

A. Well, not necessarily, but——

Q. (By Mr. Talbot): Would you explain your answer, please?

A. You don't—in this business, you buy insurance; you expect to be protected. You do the best you can at all times to keep your operation within the prescribed regulations.

Q. Do you expect your insurance to protect you if those regulations are violated in the operation of the aircraft?

Mr. Nesbett: Object again on the same ground, that it calls for a conclusion of the witness and the question is leading and the witness is not competent to answer, that it calls for a statement from the witness on an issue which is before the Court. Go ahead.

A. I think I understand your question now. Could I get it read back, please? [29]

Mr. Talbot: You bet.

(Thereupon, the Court Reporter read back the question on Page 29, Line 17.)

A. Yes.

Q. (By Mr. Talbot): Is it your testimony, then, that Cordova Airlines takes the position that this claim should be paid regardless of whether CAA regulations were observed or whether they were violated on the day in question, with respect to the operation of this aircraft? A. I do.

(Deposition of Merle K. Smith.)

Q. Did Cordova send some representative to the scene of the crash to investigate?

A. Yes, we sent our Chief Pilot down.

Q. Who is that? A. Graham Mower.

Q. Could you spell it for us, please?

A. M-o-w-e-r.

Q. And his first name? A. G-r-a-h-a-m.

Mr. Talbot: Off the record.

(Thereupon, an off-the-record discussion was had.)

Q. (By Mr. Talbot): Going back just for a minute, Mr. Smith, to the question of how much weight a Cessna 180 can carry and still be within the legal limits set by CAA. We talked about empty weight and gross weight, and I believe you said "useful weight." Did you use that expression?

A. Useful load, yes.

Q. What's useful load?

A. Well, that's the difference between your gross weight and your empty weight.

Q. And that would include what items, in useful load?

A. Well, your gas, your pilot, and your pay load.

Q. I suppose survival gear for the pilot, would that be part of the useful load?

A. Emergency gear.

Q. Emergency gear?

A. Well, that varies, sometimes that is in the empty weight and sometimes it's in some—different companies handle it different.

(Deposition of Merle K. Smith.)

Q. With regard to this particular Cessna 180 on wheels, what would be the useful load capacity?

A. I don't know—I just can't answer that because I don't know.

Q. Do you know, approximately?

A. No, I don't.

Q. You don't have any idea? A. No.

Q. Who computes the useful load?

A. Usually your maintenance people. [31]

Q. Did they compute it for this Cessna 180?

A. Yes, they do for all aircraft.

Q. Well, do you know whether they did for this particular one? A. Well, I presume they did.

Q. Did they compute it after the skis were installed?

A. I believe that would be on your 337.

Q. But, you don't know whether that was, whether it was recomputed or not?

A. No, I don't.

Mr. Talbot: You may examine.

Mr. Nesbett: No questions.

/s/ MERLE K. SMITH,

[Endorsed]: Filed May 28, 1958

In the District Court for the District of Alaska
Third Division

No. A-12,349

CORDOVA AIRLINES, INC., and NATIONAL BANK OF ALASKA, a Corporation,

Plaintiff,

vs.

UNDERWRITERS AT LLOYD'S OF LONDON, FARWEST GENERAL AGENCY AND COFFEY SIMPSON AGENCY, INC.,

Defendants.

Before: The Honorable Harry C. Westover,
U. S. District Judge.

TRANSCRIPT OF PROCEEDINGS
Anchorage, Alaska
May 29, 1958—10:00 o'Clock A.M.

Appearances:

For the Plaintiff:
BUELL A. NESBETT,
Attorney at Law,
Anchorage, Alaska.

For the Defendant:
ARTHUR D. TALBOT,
Attorney at Law,
Anchorage, Alaska, and
JAMES E. FISHER,
Attorney at Law,
Anchorage, Alaska.

The Court: I see some other counsel. Do I have another case here?

Mr. Talbot: Your Honor, Mr. Nesbett and I, who are counsel in the Cordova Airlines case, along with Mr. Fisher, were advised by the Calendar Clerk that our Motion for Production of Documents and, I believe, Motion to Amend the Complaint would be heard at this time.

The Court: Well, you know, you didn't put any time on your Motion and I forgot it was coming up here.

Mr. Talbot: I think I did, your Honor, when—I set the time—the time that I put on it was 2:00 o'clock this afternoon, but the Calendar Clerk called and said that you wanted that moved up to 10:00 o'clock.

Now, your Honor, there are some other matters of vital——

The Court: Well, let me get the file, will you please. Mrs. Sperry, will you run in on my desk and get the files?

(Thereupon, the Deputy Clerk complied with the Court's request and the following proceedings were had:)

The Court: Well, I take it back; you know, this does show 1:30. Well, this is as good as 1:30, we can dispose of the matter now.

Mr. Talbot: Your Honor, if I might explain: Mr. Nesbett and I spent about an hour and a half together yesterday [3*] and we have agreed on some

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

eleven stipulations with regard to facts and pleadings. We have agreed to almost completely revamp the pleadings to add three additional parties, to take two parties out of the case and in addition, your Honor, I am—I sincerely believe that our big defense in this case which is our allegation that this plane was carrying dynamite in violation of applicable CAA regulations and in violation of the terms of the policy. The carrying of dynamite is admitted in the pleadings and in a deposition which we have. I sincerely believe that those are questions entirely for the Court and a matter of interpreting the policy and the applicable regulations and I believe that if we could have a pretrial conference that it might be possible for your Honor to dispose of the entire case.

The Court: Well, we will have one right now. I am glad you are in because I was going to find out what this case was about if I could.

Mr. Talbot: Mr. Nesbett represents the Plaintiff. I will yield to him. Oh, your Honor, might the record show that Mr. James E. Fisher is present in court and that he is associated with me as counsel for the Defendants in this case?

The Court: The record may so show.

Mr. Nesbett: Your Honor, I am representing the Plaintiff. However, I was called in on these motions made by the Defendant, but since Mr. Talbot——

The Court: Well, now, before we get to the motions, [4] have you got the original policy here?

Mr. Talbot: No, I don't believe either side has the original policy, but——

The Court: Well, all right. Have you got any copy of the policy that you can stipulate to?

Mr. Talbot: The original—the policy in question is annexed as Exhibit A to the Plaintiff's complaint with two exceptions. Exhibit A did not have on the back thereof the conditions of the policy which simply is a failure to photostat both sides of the face sheet and Mr. Nesbett will stipulate with me this is the face sheet which actually constituted part of the certificate and the Court may consider that its terms were terms of the certificate.

The Court: Mr. Nesbett, will you stipulate that Exhibit A is the policy?—or, is a copy of the policy?

Mr. Nesbett: Yes, your Honor.

The Court: And will you stipulate that——

Mr. Nesbett: Plus the face sheet that will be passed up to your Honor, yes.

The Court: All right. That may be received. I think the Exhibit and this document here (indicating) may be received as the Plaintiff's Exhibit—as either the Defendant's or Plaintiff's Exhibit—which is it?

Mr. Nesbett: That would be Plaintiff's Exhibit.

The Court: All right, Plaintiff's Exhibit [5] One.

PLAINTIFF'S EXHIBIT NO. 1

This is to Certify That

Farwest GENERAL AGENCY

In accordance with authorization granted by certain **UNDERWRITERS AT LLOYD'S, LONDON,** ~~AND/OR COMPANIES~~ whose names and the proportions underwritten by them are or will be on file in the office of said Farwest General Agency and also on file in the office of Messrs. C. E. Heath & Co. Ltd., London England, such Underwriters and/or Companies being hereinafter called Insurers, has procured insurance as hereinafter specified for the persons named herein in respect of the coverage specified and on the terms set forth in and/or attached to this certificate. Pursuant to such authorization the Insurers do hereby bind themselves, each for his own part and not one for another, as follows

Certificate No **A-12732-178**

Renews No **A-12356-179**

Agent **Coffey-Simpson Agency**

SCHEDULE

1. Name of Assured: **CORDOVA AIRLINES, INC.**

Address of Assured: **ANCHORAGE, ALASKA**

3. Certificate Term From **October 24, 1955** To **October 24, 1956**
12:01 A.M., standard time at the address of the named assured as stated herein.

4. Assured's Business or Profession is **SCHEDULED AND NON-SCHEDULED AIRLINE**

5. Assured's interest in the Aircraft is that of **OWNER**

It is understood that 70.93% (Part of 100%) of the coverage expressed herein is subscribed to by Underwriters at Lloyd's, London; and their liability is limited to the same percentage of the limits expressed herein.

6. Description of Aircraft, Value(s), Limit(s) of Liability, Premium(s)

Aircraft Identification Mark and Number Column 1	AIRCRAFT MAKE AND MODEL Column 2	YR. OF MFG Col. 3	TYPE Column 4	PAX CAP (Seat Conf.) Col. 5	ENGINE MAKE AND H.P Column 6	AGREED VALUE Column 7
-SEE ENDORSEMENT NUMBER ONE -						

AIRCRAFT IDENTIFICATION MARK AND NUMBER Column 8	SECTION 1 LOSS OR DAMAGE TO AIRCRAFT Flight risks not insured unless amount of deductible entered in column 9 hereunder: Deductible Flight Risks Column 9	Premium Charge Column 10	SECTION 2—THIRD PARTY LIABILITY LIMITS OF LIABILITY COVERAGE A PUBLIC LIABILITY (Excluding Passengers) One Person Column 11	One Accident Column 12	COVERAGE B PROPERTY DAMAGE One Accident Column 13	COVERAGE C PASSENGER LIABILITY One Person Column 14	One Accident Column 15	PREMIUM CHARGE Column 16
- SEE ENDORSEMENT NUMBER ONE -								
	$						$	

7. Pilots: Pilots holding a valid pilot's airman certificate and proper ratings issued by the Civil Aeronautics Authority for the type of aircraft flown and the kind of flying performed.

8. Purposes for which Aircraft will be used: Private business and private pleasure flying and commercial operations including passenger and freight flights for hire or reward but excluding student instruction.

9. Geographical Limits: United States, Canada, Alaska and not exceeding 100 miles into Mexico.

United States Internal Revenue Documentary Stamps in the amount required and applicable to this insurance have been affixed to the office records of this Certificate retained by Farwest General Agency.

The law provides for no federal tax refund once the insurance attaches.

It is agreed that in the event of the failure of Underwriters hereon to pay any amount claimed to be due hereunder, Underwriters hereon, at the request of the Assured, will submit to the jurisdiction of any Court of competent jurisdiction within the United States of America and will comply with all requirements necessary to give such Court jurisdiction, and all matters arising hereunder shall be determined in accordance with the law and practice of such Court.

It is further agreed that service of process in such suit may be made upon

Wm. Renfrew, Anchorage, Alaska

and that in any suit instituted against any one of them upon this contract, Underwriters will abide by the final decision of such Court or of any Appellate Court in the event of an appeal.

The above named are authorized and directed to accept service of process on behalf of Underwriters in any such suit and upon the request of the Assured to give a written undertaking to the Assured that they will enter a general appearance upon Underwriters' behalf in the event such a suit shall be instituted.

Further, pursuant to any statute of any state, territory or district of the United States which makes provision therefor, Underwriters hereon hereby designate the Superintendent, Commissioner or Director of Insurance or other officer specified for that purpose in the statute, or his successor or successors in office, as their true and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted by or on behalf of the Assured or any beneficiary hereunder arising out of this contract of insurance or reinsurance, and hereby designate the above named as the person to whom the said officer is authorized to mail such process or a true copy thereof.

October 24, 1955
Seattle, Washington

Farwest GENERAL AGENCY
By s/ Thomas Telfer

Mr. Talbot: Your Honor, we originally had a dispute about Rider No. 6 of this policy, but that dispute has been eliminated by further stipulation.

The Court: Well, now, let's get the policy before the Court.

Mr. Talbot: All right. I hand a copy of the face sheet to the bailiff.

(Thereupon the document was presented to the Court.)

The Court: Now, will you point out to me in the policy the clause relative to carrying dynamite?

Mr. Talbot: Yes, your Honor. There are two clauses; both under General Exclusions, about the middle of the page. The General Exclusions section provides this certificate does not cover any loss, damage or liability arising from "(c) any flying in which a waiver issued by the Civil Aeronautics Authority is required unless with the express written consent of Farwest General Agency for Insurers."

Now, that is one of our defenses. We claim that they should have had a waiver from CAA; that they didn't get a waiver from CAA and that they didn't get the written consent of Farwest General Agency for the insurers.

The Court: Well, now, just a minute. Mr. Nesbett, do you agree that a waiver was required?

Mr. Nesbett: No, your Honor, and that brings us back to the motion. They have moved that at [6] this time and want your Honor to rule this morning on whether they can assert the lack of waiver as a fourth and separate affirmative defense and that is

something your Honor will have to rule on before they can, in my opinion, rely on the specific waiver of—provision of the policy.

The Court: All right. Now, where is—is there another clause?

Mr. Talbot: The other clause on which we rely is General Exclusion No. 4; namely, the use of the aircraft for an unlawful purpose.

The Court: Well, now why was the aircraft used for an unlawful purpose?

Mr. Talbot: Because the purpose of this flight was carrying contraband in effect; that is, dynamite in violation of the law.

The Court: Well, wait a minute. Isn't it lawful to carry dynamite in a plane?

Mr. Talbot: It was not, your Honor at that time and under those circumstances, and Section——

The Court: May I inquire, was this a passenger plane or freight plane?

Mr. Talbot: It was being used as a freight plane, your Honor.

The Court: And you say it was unlawful to carry dynamite on a freight plane? [7]

Mr. Talbot: Yes, your Honor, and we are prepared——

The Court: Just a minute. Mr. Nesbett, do you agree?

Mr. Nesbett: No, your Honor. There is where we part company, vitally, with Lloyd's.

The Court: Where is your regulation? Let me see your regulations.

Mr. Nesbett: Your Honor, would you hear me

just a moment on that because I think it's going to be the whole core of the case, an interpretation of that clause of the policy because—Mr. Talbot has quoted it right, but it says that the exceptions shall apply and you notice, your Honor, that is an exception—the exception shall apply when the plane is being used for an unlawful purpose with the knowledge and consent of the assured.

Now, your Honor, the fact that, as Mr. Talbot contends, it might have been not in compliance with CAA or ICC rules or regulations in connection with the carriage of dynamite doesn't make the purpose. That is the word I am relying on, the purpose of the flight was to move dynamite from one location to another to construct the radar site for the U. S. Air Force. The purpose of it was not unlawful. The purpose of it was entirely lawful and that is where we will——

The Court: Just a minute, now, do you agree that this dynamite was being carried for the purpose of constructing [8] a radar site or to be used in the construction of a radar site?

Mr. Talbot: Yes, your Honor, indeed we do, but——

The Court: Well, may I inquire now, down where I come from you know you can transport merchandise by truck and by automobile and by railroad and by air, but you up here, many, many times, the only way you can transport merchandise is by air unless you want to revert to a dogsled in the wintertime, but how are you going to get dyna-

mite out to some of these remote areas unless you use a plane?

Mr. Talbot: You do what the criminal statue says you have to do: you go to the CAA and get a permit for the dynamite.

The Court: The criminal statue?

Mr. Talbot: Yes, sir, Section 460 of Title 49 of United States Code declares that it will be unlawful to violate regulations made under that chapter and the concluding sections of that chapter set forth criminal penalties for violations thereof and this is analogous, your Honor, to the cases under the Volstead Act, not to the same degree, I admit, but legally analogous to those cases where a vehicle was being used to transport illicit liquor. I say that under the law and the regulations, this dynamite was contraband. Now, if we are right——

The Court: I don't know how in the world you can say [9] dynamite is contraband if it's being transported from place to place for the purpose of constructing a governmental installation. I don't know how in the world you can say it's contraband, Now, liquor might have been contraband if it was made illegally; dope might be contraband; articles might be contraband, but how in the world dynamite if it's going to be used in the construction of a governmental radar station. I don't know——

Mr. Talbot: I agree with your Honor, that the word "contraband" is probably too strong but my point is that the carriage of a prohibited explosive is unlawful.

The Court: Let me see your regulation that says you can't carry dynamite. Where is your regulation?

Mr. Talbot: We start on that point, your Honor, with Section 49.0 of the Civil Aeronautics regulations which are found in Vol. 14 of the Code of Federal Regulations. Section 49.0 provides as follows: "Explosives or other dangerous articles shall not be loaded in or transported by civil aircraft in the United States or transported anywhere in air commerce in civil aircraft of the United States registry except as provided in this part."

The Court: Well, now that raises another question. That says "United States." Is Alaska the United States?

Mr. Talbot: Indeed, it is, your Honor.

The Court: It's a Territory, but does that regulation [10] apply as to Alaska?

Mr. Talbot: I can refer your Honor, and I will, to CAB regulations specifically applying this section to Alaska.

The Court: Well, maybe Mr. Nesbett will agree. Does the United States include Alaska?

Mr. Nesbett: Sometimes it does; sometimes it doesn't, your Honor. I think in the definition in the Civil Aeronautices Act it says that the word "United States" shall include certain of the possessions and including Alaska. I wouldn't want to be bound by any stipulation at this point in connection with that but that's my knowledge of it at this point.

The Court: Well, you admit, do you not, that you never did get consent, if consent was required?

Mr. Nesbett: No, your Honor, we don't admit that at all.

The Court: Oh, you don't admit it?

Mr. Nesbett: Of course, for the first time this morning, I have learned what they intend to show in connection with their affirmative defenses, but we don't admit that at all. We have certain orders issued by the CAB covering the carriage of dynamite which use the word "any airport in the United States," which of course, under the interpretation I just mentioned of the meaning of the "United States" would include Alaska, which would amount to a blanket exemption in the background. Likewise, your Honor, there is another [11] regulation of the Civil Aeronautics Board which specifically deals with the Alaska situation and names the airlines that can carry dynamite; however, that regulation was issued shortly after this accident, but the first order I mentioned, the blanket order of the CAB was issued prior to the accident. Likewise, there is in the background an interpretation of what is or is not Class A explosives, your Honor; and, lastly, the action of the U. S. Air Force in obtaining any exemption that might have been obtained blanket exemption as an emergency defense measure and last, but not least, the attitude and definitions or advice given by local CAA and CAB officials at the time and in connection with this very sort of carriage in Alaska in interpreting what was Class A and Class B explosives. Actually, if it comes to that, I will show that high CAA officials and the CAA attorneys at that time interpreted the particular type dynamite

that was on this airplane as being a Class B explosive, your Honor, and therefore, even if you take the involved ICC regulations and the Civil Air regulations that he's mentioned, it was considered not to come within the prohibited carriage because under the ICC regulations in the States, it was Class B and could have been carried by rail freight rather than express. You have to go to those definitions to determine what could be flown and what can't; if it could have been flown in rail freight in the States, it's in one classification; if it was prohibited for express in the—under [12] the ICC regulations as prohibited from air carriage without special waiver, your Honor, it's rather involved.

The Court: Well, may I inquire from opposing counsel? Do you agree that there is a difference between Class A and Class B dynamite?

Mr. Talbot: No, between Class A explosives and Class B explosives; but all general dynamite, that is, dynamite containing a liquid ingredient, and indeed, all commercial, popular commercial dynamite in this country is of that type. All that dynamite is Class A and is so defined by the regulations. Now, the next regulation which I have——

The Court: Well, now, read that regulation again, will you—49.0.

Mr. Talbot: 49.0 says: "Explosives or other dangerous articles"— listing some of them not applicable here—"shall not be loaded in or transported by civil aircraft in the United States or transported anywhere in air commerce in civil aircraft

of the United States registry except as provided in this part."

The Court: All right, now, what's your other regulation?

Mr. Talbot: The next section which your Honor, I believe, must consider is Section 49.81 of the CAB regulations. Now that provides as follows: "Prohibited articles. No explosive or dangerous article listed in the ICC Regulations, [13] 49 CFR, Part 72, as an explosive A, a poison A, a forbidden article or as an article not acceptable for rail express (See Section 49.62 for authorization of the carriage of certain radioactive materials), nor any article listed in appendix A hereto shall be carried on aircraft subject to the provisions of this part."

So, by Section 49.81 we have four classes of articles which are prohibited from carriage on aircraft—Class A explosives as defined by the ICC, Class A poisons as defined by ICC, or a forbidden article, which is really contraband, something that will not be accepted under any circumstances for transportation, or an article which you can't ship by railway express.

Now, our position—or, an article listed in appendix A, and they list about one hundred articles in the appendix A, but dynamite is not one of them. But dynamite is—and I will point that out to your Honor—a Class A explosive under the ICC regulations. Now, our interpretation of this section is: that if it's a Class A explosive it's forbidden; if it's a Class A poison it's forbidden; if it's in appendix A it's forbidden and in addition to that, if you can't

ship it by railway express it's forbidden. Now, I expect that Mr. Nesbett will contend that what this section really means is that it's all right to ship a Class A explosive or a Class A poison or an item listed in appendix A if you could ship it by [14] railway express, but that is not the way we read the regulation and we go further than that. We say that you couldn't ship this dynamite by railway express any way. Now, CAB by that section has adopted the ICC classification and regulations on this subject. Now, turning to the ICC regulations, Section 72.5 thereof, and these are found in Volume 49 of the Code of Federal Regulations, Section 72.5 is a long list of commodities and both dynamite and blasting gelatin, which is a species of dynamite, which this was, are both classified as high explosives by this table of the Interstate Commerce Commission and in this same table, your Honor, the extreme righthand column is the column which tells you whether or not the commodity can be shipped by railway express. And I might mention here that the Interstate Commerce Commission makes a sharp distinction between railway express shipments and rail freight shipments. For some reason it is not entirely clear to me but at least there is sufficient difference in the risk and in the handling, in the opinion of the ICC, that they treat rail freight and rail express differently and they devote entirely different parts of the regulations to those two classifications of freight and that's an important distinction because I am willing to concede that these fifty pound cases of forty percent dynamite could have

been shipped by rail freight and indeed, that is how they got here to Alaska, by rail to Seattle and by boat to Seward and then by the Alaska Railroad to Anchorage. And we don't dispute that but we do say that you couldn't ship these fifty pound cases of dynamite by railway express and that, therefore, there is absolutely no possibility that the CAB made an exception which would cover a shipment of this kind. Now, turn to the commodity table under "high explosives," the righthand column says "maximum quantity in one outside container by rail express" and under many of the items it says "not accepted"; that is, you can't ship it by railway express at all, but with regard to high explosives, when you get over in that column to see whether or not you can ship high explosives, which this is, by rail express, they don't say "not accepted;" they say "see section 73.86."

Now, Section 73.86, which in our view is the only allowable way of shipping a high explosive by railway express, has this to say, and Part D, Section D thereof, or sub-section D: "Samples of explosives and explosive articles for transportation by rail freight, rail express, or highway, * * *" and it's a long section, your Honor, but the material part of it is that samples of high explosives may be shipped by rail express provided they are in half-pound lots, separately wrapped and no more than twenty of these half-pound samples in an outside container, so that the maximum amount of a high explosive that could be shipped by railway express would be a ten pound package for laboratory analysis destined

for some governmental laboratory for examination and that is the only way you can [16] ship this stuff by railway express, but here, we have fifty pound cases of dynamite which simply would not have been accepted for railway express. I may have gone too far because as I read the CAB regulation, Class A explosives are prohibited period, and whether or not you could ship it by railway express—I can't believe that in view of the wording of that section, that CAB meant that it's all right to ship Class A poisons or Class A explosives or some item that they list in their own appendix of prohibited articles provided you could get it on railway express. The clear meaning of that section is that they are setting up another—an additional classification of prohibited articles; namely, articles which cannot for one reason or another be shipped by railway express and they insert right in the middle of that clause a reference to regulations having to do with radioactive substances. And the ICC regulations for rail express are full of provisions having to do with the handling of radioactive material and I think that is what the CAB meant. And I think that from the other two regulations, the special regulations which were passed for the Air Force and for Morrison-Knudsen Company and Cordova Airlines in Alaska, that it's perfectly clear when your Honor gets to those regulations that Class A explosives are now and always have been prohibited under Part 49 of the CAB regulations.

The Court: May I ask you a question?

Mr. Talbot: Yes, sir. [17]

The Court: Is your contention that because of the prohibition that you couldn't get the consent to make such shipments?

Mr. Talbot: No, your Honor.

The Court: Do you agree that you could get consent?

Mr. Talbot: Yes, sir. Section 49.71 of the CAB regulations authorizes the Administrator, and I take that to be the head of the Civil Aeronautics Administration, to grant a waiver for a particular flight provided the safeguards therein enumerated are taken.

The Court: Well, now, let's get back for a moment—we are out here in Alaska, a long ways from the Administrator back in Washington. You mean to say you got to go clear back to Washington to get consent?

Mr. Talbot: No, sir; all you got to do is pick up the phone and dial Merrill Field and I am sure that we can show that carriers here have regularly received such waivers for movements of this kind; that there wouldn't have been any trouble or effort at all for Cordova Airlines to have secured lawful authority to transport these explosives.

Now, there's another——

The Court: You agree then that lawful authority to transport could have been obtained?

Mr. Talbot: Could have been obtained, yes, sir, and wasn't. Now, there's another important section in the CAB [18] regulations and that has to do—that section is 49.3b. You see, you have a problem in these cases, your Honor, because a carrier like Cor-

dova to whom a package of explosives is presented, they don't know what's in the package without opening it and maybe making a laboratory analysis; they don't know whether it's forty percent gelatin dynamite or liquid TNT, except perhaps from the label and because of that fact and in order to help the carriers in—the CAB passed this section 49.3b which we claim was also violated. 49.3b provides as follows: "No shipper shall offer, and no carrier or other operator of aircraft shall knowingly accept any explosive or dangerous articles for carriage by air unless the shipper or his authorized agent has certified that the shipment complies with the requirements of this part. No shipment shall be accepted for transportation by passenger carrying aircraft unless the package is accompanied by or shows clearly and plainly, visible statement that it is within the limitations prescribed."

The Court: Well, didn't you agree a minute ago that—or, did you agree that this was not a passenger flying——

Mr. Talbot: That is right; that part would apply.

The Court: ——that this was freight?

Mr. Talbot: That is true, your Honor, but the earlier part of paragraph "b" does apply. That is, that no carrier shall accept a shipment of explosives without a certificate [19] from the shipper, that it complies with these regulations.

The Court: Well, may I inquire, Mr. Nesbett, when the—your client accepted the explosives, did they know they were accepting explosives?

Mr. Nesbett: Probably the pilot, located out in a

remote area at an Alaskan place called Lake Iliamna, when he loaded it aboard probably knew that it was dynamite, your Honor. As to the knowledge of the home office that he was out there flying dynamite at that particular time, no. We have stipulated that—no, we haven't stipulated, but it's stated in the pre-trial memorandum that is going to be presented to you that the airplane belonged to Cordova Airlines, but was chartered to Morrison-Knudsen Company, a large construction firm here; that Morrison-Knudsen Company was a subcontractor to Western Electric and Western Electric was under the contract with the U. S. Air Force to construct these sites. Therefore, Cordova's airplane, the one that was destroyed, was in the custody or in charge of one of its employees and pilot, a person named Herb Haley, and he was on charter out in the bush, as we call it, to do as he was directed and fly as directed by representatives and officials of Morrison-Knudsen Company. Apparently, in the course of his duties out in the bush where he stayed out there flying for this radar site, he was told to, on this particular occasion, to "now haul this dynamite that we have at Lake Iliamna over to the actual radar construction [20] site at Big Mountain," and that he had loaded some aboard and was about to land at Big Mountain when he crashed. However, the dynamite didn't explode as we have stipulated here and the stipulations will be passed up to you.

Now, as to the pilot knowing, I don't know what the pilot knew but certainly, he was an intelligent

man and highly trusted employee and the labels and cartons were no doubt marked. He could have seen them.

The Court: Was the pilot an employee of Cordova?

Mr. Nesbett: He was paid by Cordova Airlines and the airplane was on hourly charter for a ninety day period to Morrison-Knudsen Company under the chain of contracts with relation to what I just mentioned.

The Court: Well, is there anything in that policy that provides that the carrying of the dynamite must contribute to the destruction of the plane?

Mr. Nesbett: It doesn't—of course, dynamite isn't mentioned in the policy.

The Court: All right, the explosives.

Mr. Nesbett: Well, neither are high explosives mentioned, your Honor. The clause they're relying on is No. 4 under the General Exceptions, and they say that this was—this flight was for an unlawful purpose, which, as I mentioned before, is where we part company with Lloyd's on the interpretation. Our contention was the purpose of the [21] flight was entirely lawful. They're contending that a violation, possibly, as they contend of a ICC or CAB regulation made the purpose unlawful. We say the purpose was lawful and then, of course, the clause goes on to say "with the knowledge and consent of the assured."

Now, the assured is Cordova Airlines, Inc.

The Court: Well, if one of the employees of Cor-

dova had knowledge and gave consent wouldn't that be the knowledge and consent of the assured?

Mr. Nesbett: I don't think so, your Honor, but even if your Honor should so hold, you have the other aspects that we mentioned, the waivers in the background which would be a rather involved testimony. The one waiver or rather blanket order made on December of the year of the accident and prior to the accident, we contend is an exemption, in spite of any interpretation you might put on those involved ICC regulations.

We contend that certainly the subsequent regulation, not an order regulation applying specifically to Alaska, clarified and extended the original order which was to apply to all of the United States which includes Alaska under the reading of the Act; and lastly, of course, the advice that was given by CAA officials here and their interpretation of those ICC regulations at that time. That was in 1955. Their thinking was that forty percent gelatin, not being sixty [22] percent was not Class A. The ICC regulations that your Honor will read as a result of this hearing will point out sixty and forty percent, or, rather, up to sixty percent as being Class B and beyond sixty percent as being Class A. This was forty percent. The thought at that time was that no waiver was required in any event, if the—if it was flown by a plane which was carrying only freight which, of course, was the case here.

The Court: May I inquire? Has there been any decisions relative to these matters or——

Mr. Talbot: Yes, your Honor, we relied very heavily——

The Court: All right. What's your citation?

Mr. Talbot: Bruce vs. Lumbermen's Insurance Co., 127 Fed. Sup. 124, affirmed by the Fourth Circuit Court of Appeals at 222 Fed. Sec. 642, a case decided——

The Court: Don't tell me what the case is; I want your citations. I am going to read your case.

Mr. Talbot: Very well. That case in turn was based upon a Supreme Court case. That Supreme Court case is in my brief, your Honor, and your Honor will see that shortly but there is a Supreme Court case on the point and Bruce vs. Lumbermen's was cited with approval and followed by the Eighth Circuit in 1956, in the case of one Globe Indemnity vs. Hansen, 231 Fed., Sec. 895, and the holding of those three cases is that no causal connection need be shown between a [23] breach of regulations—CAB regulations and the casualty itself.

The Court: Mr. Nesbett, have you got any cases you would like me to read?

Mr. Nesbett: I have read both of those cases. I suppose there's no point in arguing them now. Yes, your Honor, I have. Of course, pointing out in those cases, they were dealing with specific exclusions and provisions.

The Court: I will read the cases and I will decide what the cases read. I just want your citations so I can read them.

Mr. Nesbett: There's another line of cases which, of course, hold that no causal connection between

the accident and the carrying of explosives, for example, need be shown and/or rather, that causal connection must be shown in order to prevent a recovery and those cases are represented by cases such as 81 Northwestern, 484; 217 Southwestern, 462.

The Court: That is 462?

Mr. Nesbett: 462, your Honor, and, of course, going back and before any of that argument is applicable, the matter of the definition of the wording "purpose of the flight" is all important. Was the purpose illegal, unlawful? The purpose, we contend that the meaning of that phrase was that the assured must have known and consented to the use of the airplane in flying, as Mr. Talbot phrased it actually, contraband, [24] actual contraband, or flying aliens in and out of the United States, or flying the airplane to accomplish any illegal purpose. The purpose—not the fact that it might have been technically illegal with respect to a flight which was designed to accomplish a good and lawful purpose. There is the difference, and I contend, of course, that must be ruled on before even these cases cited, Bruce vs. Lumbermen's is considered; however, here is a very interesting case, your Honor, two of them and I know your Honor will read them with a great deal of interest and care. They were decided by the Ninth Circuit Court of Appeals, just in the last three years and they involve a policy with the wording almost identical with ours and they involve an airplane accident and they involve, as a matter of fact, one of the defendants, Eagle

Star Insurance Co., and the last decision on that case, your Honor, is reported in 201 Fed. Sec. at page 764. That was the decision of the Ninth Circuit, your Honor, after——

The Court: You say there was another Ninth Circuit case, you said?

Mr. Nesbett: I was just going to say that was a decision after a rehearing on a decision on the same case, reported in 196 Fed. Sec., just a year or so previously—196 Fed. Sec.—well, I haven't the page number, but the page number is given in the 201 citation.

The Court: All right. [25]

Mr. Nesbett: There, the words "due diligence"—of course, there are other clauses in this policy that I am relying on, and "reasonably practicable" and the flight of the airplane under "negligent condition" are all considered.

Now, other authority, your Honor, on the question of—well, that is all I have to cite right at the moment. I will get into the general conditions of the policy, I suppose, later in——

The Court: Well, now, you say you have other clauses in the policy which you rely on. Point them out to me, will you? What is your——

Mr. Nesbett: Now, those are the exclusions. Of course, my whole theory of the interpretation of this insurance policy—I'd like to just tell you about it briefly as a whole, your Honor. If you will look at the face sheet that you have——

The Court: What sheet are you looking at?

Mr. Nesbett: The face sheet that was passed up

to you as part of Exhibit A. Right at the top of the page, Section 1 "Loss or Damage to Aircraft," top of the page.

Mr. Talbot: That's on the back, Mr. Nesbett.

Mr. Nesbett: On the back.

The Court: Well, are you talking about this? (Indicating.)

Mr. Talbot: Yes, and it's the backside of that page, [26] your Honor.

The Court: All right.

Mr. Nesbett: Section One, "Loss or Damage." Now, there in Section A of subsection A of section one it says: "The Insurers will pay for or make good accidental loss of or damage to the Aircraft whilst in flight or on the ground or on the water, including any equipment or accessories while attached to and forming a part of the Aircraft, from whatever cause arising except * * *"—now, your Honor, my theory is there are the exceptions to the coverage—"except frost; wear and tear; corrosion; gradual deterioration; mechanical breakage or breakdown, but including accidental damage caused thereby."

Now, there is the insuring clause of the policy and you will find, your Honor, in reading these Ninth Circuit cases that they concern themselves with that same clause in determining the difference between the exceptions and exclusions and general conditions, all of which we have here in a similar policy. There is the insuring clause with exceptions.

Now, we go down, your Honor, to the next por-

tion of that sheet that I consider applicable and has been pleaded as a defense and look at General Exclusions, and there, your Honor, under No. 4, we come to the Section that has just been discussed here. As a general exclusion they state in the second portion of that sentence, after the use of a semicolon, they [27] say, as an exclusion: "the use of the Aircraft for any unlawful purpose * * *" unlawful purpose, "if with the knowledge and consent of the Assured;"

Now, it's our contention, of course, that the purpose was not unlawful at all. Now, if the purpose was not unlawful, the purpose, that is, of transporting the dynamite from Iliamna to Big Mountain to be used there in the construction of this defense project, then—and they have pleaded it this way—that the carriage of the dynmite was not only a violation of the general exclusion, but it was a violation then of one of the general conditions which follow next; and they mention specifically, your Honor, General Conditions, No. 2, which says, "The aircraft shall be operated at all times in accordance with its Operations Limitations and/or CAA Approved Operations Manual, and in accordance with operations authorized as set forth therein."

Now, if the flight was not for an unlawful purpose, you must and have to revert then to the General Conditions, so in stepping along in the back of this policy to see whether you are covered or not, first, you look at the top and see that you are covered in all situations in flight, or on the ground,

land, or water, except frost, corrosion and so forth. Those are the exceptions that come down and say "here are the general exclusions" and we are only concerned with the accident of whether or not you can call it—call the purpose of this [28] flight unlawful. Then, if not, then you must go down to the section they plead along with the exception and say, "well, then, it was not in accordance with CAA Approved Operations Manual and within Operations Limitations." Now, they have not pleaded it and, of course, I didn't reply to any affirmative defenses, but there is to be considered in connection with that General Condition of No. 2, of course, the following General Condition No. 3, and those are the aspects of a policy of this type that were gone into in such detail by Judge Lemon and Judge Pope in their Washington case.

Where it says, "The Assured shall use due diligence and do and concur in doing all things reasonably practicable to avoid any loss or damage under both Sections 1 and 2" above "of this Certificate"—do you see that, your Honor?

The Court: Yes, I see it.

Mr. Nesbett: Well, your Honor, the wording of the face sheet of this policy in that section I just read apparently has been changed by Eagle Star and Lloyd's since that lawsuit that appeared in the Ninth Circuit because in that wording in the Ninth Circuit, it was different. Here, they have put a period after the word "policy" and after the words "do and concur in doing all things reasonably

practicable to avoid any loss or damage" they refer specifically to Sections 1 and 2 immediately above. Well, Section 2 requires that the aircraft be operated in accordance with regulations and so on. [29] Now, the meaning of the words "due diligence" as I say, if it was not an unlawful purpose, we must resort to this wording if you are going to bar a recovery. The words say "due diligence and do and concur in doing all things reasonably practicable to avoid any loss * * *" The court considers the words, "due diligence," and they consider in some very small detail, as I recall, the words "concur in doing all things reasonably practicable." There, they have said immediately above that section in No. 2, "it shall be operated at all times, the aircraft, in accordance with Operations Limitations and Manual." It follows up and says, however, in effect, "The Assured shall use due diligence and do and concur in doing all things reasonably practicable to avoid any loss or damage under 1 and 2 above," which refers to Operations Limitations and so forth.

Now, the Ninth Circuit said that those words meant that that—those words referred to negligence. The assured in this case under my theory, your Honor, must have been negligent, if there is any violation of Operations Limitations shown, negligent in not taking the proper steps to have prevented it from happening in the field.

Now there is the whole theory of our case.

The Court: Well, our Reporter probably has

been the hardest working person in the courtroom this morning. I think she ought to have a little recess. She's uncomplaining and goes ahead and does her job and if I don't look after her, [30] nobody else does, so we will now recess until twenty minutes after eleven.

(After a short recess, the following proceedings were had:)

The Court: Counsel, when I so rudely interrupted you awhile ago you wanted to say something, so now this is your time.

Mr. Talbot: Thank you, your Honor. In connection with the Ninth Circuit Court of Appeals decision which Mr. Nesbett cited, that case did indeed interpret almost the identical language of General Condition No. 3 of our policy and on the first hearing the Ninth Circuit held that that provision meant that the Airlines was responsible if the loss resulted from its own negligence and in the second hearing they held that that paragraph was ambiguous and that therefore, it should be interpreted to mean that the Airlines was responsible if they were negligent in preserving the wreck after the crash with resulting loss to the Underwriters. And so we don't rely on that paragraph at all and we haven't pleaded it and we don't believe it's applicable in this case at all. Mr. Nesbett is absolutely right, so far as I can read this policy, with respect to the question of carriage of dynamite only, and not the question of overloading, which is the second

big issue in the case. But on this whole question of the carriage of dynamite, unless we are excused under General Exclusion No. 4, that is, that [31] the Aircraft was used for an unlawful purpose with the knowledge of the assured. If we are wrong, if this was a lawful purpose, for example, or if the assured had no knowledge and didn't give its consent, then we lose on this particular defense.

The Court: Well, now, you say the issue here is overloading.

Mr. Talbot: That is the second issue which neither Mr. Nesbett nor I have mentioned to the Court, yes. That, we believe, is an issue which will have to be tried by the jury in view of the evidence and the questions of facts which are raised. We are in complete disagreement as to how much dynamite was on this plane.

The Court: Was there a limit what this plane could carry?

Mr. Talbot: Yes, your Honor, and we expect to show that and we expect to show as a matter of fact that the—by a preponderance of the evidence, that the plane had on board sixteen cases of dynamite weighing eight hundred and forty-eight pounds and that she was four hundred and forty-eight pounds overloaded, in violation of General Exclusion 1(c) which requires—I beg your pardon—General Condition No. 2 which requires that the plane shall be operated at all times in accordance with its Operations Limitations and Operations Manual. Now, the manual sets forth a way of determining the legal useful load of the aircraft and we

are going to have to [32] have, it seems to me, some expert testimony on that point as to what was the legal load limit for this airplane.

The Court: How long do you estimate this case is going to take to try?

Mr. Talbot: Two days.

The Court: Mr. Nesbett?

Mr. Nesbett: Well, I don't know what he has in the way of proof, your Honor. With the jury, I'd say probably three days.

The Court: Well, this matter all came up this morning because you were in court upon a notice. Now, before we go to the Motion for Production, I think we ought to dispose of first, the Motion to Amend.

Mr. Talbot: If the Court please, there are two other important regulations.

The Court: Are there—what are they?

Mr. Talbot: I'd like to call the Court's attention—the first one is called CAB Regulation S-712 which became effective December 2, 1955, sixteen days before this crash, and that was a special regulation granting the Air Base permission to transport certain explosives by civil aircraft. We think it's clear from a reading of that regulation that it has nothing whatever to do with our case. Nevertheless, Mr. Nesbett is going to rely on it and the Court should consider it. The second regulation is Regulation SR-417 which was [33] adopted on May 28, 1956, about five months after this crash, and it's that regulation that I'd like to dwell on just a

little bit. Because what happened, your Honor, was that after this crash, Morrison-Knudsen Company went to CAB and requested a special regulation exempting Morrison-Knudsen and aircraft chartered by them, and specifically designating Cordova Airlines among others, and went to CAB and asked for permission to carry Class A explosives. And we say we think it's clear from this regulation that what happened in May of '56, was that CAB granted blanket permission to M-K, Cordova and others to carry this self-same dynamite for these self-same projects.

Now, this regulation is important because it, as I believe, is an authoritative interpretation of Part 49 of the CAB regulations with which we are concerned and it shows clearly the intent of the CAB with regard to this particular question.

I have certified copies of those two regulations and they are not printed in full in the Code of Federal Regulations. These were, incidentally, furnished to me by Mr. Nesbett who was kind enough to get two copies. I'd be pleased to furnish this to the Court at this time.

The Court: Well, I wish you would.

Mr. Talbot: I have underlined in red, I regret to say, the parts that I think are important, but I underlined a couple of things that would help Mr. Nesbett, too.

The Court: They may be received and I think they [34] ought to be introduced as exhibits in this case if they are going to be used.

Mr. Nesbett: Your Honor, could I ask then that your Honor accept two copies that are not underlined?

The Court: Oh, all right.

Mr. Talbot: That is quite agreeable with me.

The Court: Have you got some that is not underlined?

Mr. Nesbett: Yes, sir, and then in exchange for the two copies that are underlined, so that I will have a copy.

The Court: It may be received as Defendants' Exhibit A.

Deputy Clerk: Defendants' Exhibit A.

DEFENDANT'S EXHIBIT A

PLAINTIFF'S EXHIBIT 1 Cooper Cause

Farwest GENERAL AGENCY

EXCHANGE BUILDING • SEATTLE 4, WASHINGTON

Purchased Through

Renews No. Cert. No.

Assured

Effective Coverage Expires

AIRCRAFT CERTIFICATE

NOTICE

NO FLAT CANCELLATIONS ALLOWED

PREMIUM $

Federal Tax $

Policy Fee $

State Tax $

Surplus Fee $

$ $

This is to Certify That

Farwest GENERAL AGENCY

in accordance with authorization granted by certain **UNDERWRITERS AT LLOYD'S, LONDON, AND/OR COMPANIES** whose names and the proportions underwritten by them are or will be on file in the office of said Farwest General Agency and also on file in the office of Messrs. C. E. Heath & Co., Ltd., London, England, (such Underwriters and/or Companies being hereinafter called Insurers), has procured insurance as hereinafter specified for the persons named herein in respect of the coverage specified and on the terms set forth in and/or attached to this certificate. Pursuant to such authorization the Insurers do hereby bind themselves, each for his own part and not one for another, as follows:

Certificate No.

Renews No.

Agent

SCHEDULE

1. Name of Assured

2. Address of Assured

3. Certificate Term: From To
12:01 A. M., standard time at the address of the named assured as stated herein.

4. Assured's Business or Profession is

5 Assured's interest in the Aircraft is that of

6. Description of Aircraft; Value(s); Limit(s) of Liability; Premium(s):

Aircraft Identification Mark and Number	AIRCRAFT MAKE AND MODEL	YR. OF MFG.	TYPE	PASS. CAP. (Excl. Crew)	ENGINE(S) MAKE AND H.P.	AGREED VALUE
Column 1	Column 2	Col. 3	Column 4	Col. 5	Column 6	Column 7

AIRCRAFT IDENTIFICATION MARK AND NUMBER	SECTION 1 LOSS OR DAMAGE TO AIRCRAFT		SECTION 2—THIRD PARTY LIABILITY					PREMIUM CHARGE
	Flight risks not insured unless amount of deductible entered in column 9 hereunder		LIMITS OF LIABILITY					
			COVERAGE A PUBLIC LIABILITY (Excluding Passengers)		COVERAGE B PROPERTY DAMAGE	COVERAGE C PASSENGER LIABILITY		
	Deductible Flight Risks*	Premium Charge	One Person	One Accident	One Accident	One Person	One Accident	
Column 8	Column 9	Column 10	Column 11	Column 12	Column 13	Column 14	Column 15	Column 16
	$						$	

7. Pilot(s):

8. Purposes for which Aircraft will be used:

9. Geographical Limits:

United States Internal Revenue Documentary Stamps in the amount required and applicable to this insurance have been affixed to the office records of this Certificate retained by Farwest General Agency.

The law provides for no federal tax refund once the insurance attaches.

It is agreed that in the event of the failure of Underwriters hereon to pay any amount claimed to be due hereunder, Underwriters hereon, at the request of the insured (or reinsured), will submit to the jurisdiction of any Court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction **and all matters arising hereunder shall be determined in accordance with the law and practice of such Court.**

It is further agreed that service of process in such suit may be made upon

and that in any suit instituted against any one of them upon this contract, Underwriters will abide by the final decision of such Court or of any Appellate Court in the event of an appeal.

The above-named are authorized and directed to accept service of process on behalf of Underwriters in any such suit and/or upon the request of the insured (or reinsured) to give a written undertaking to the insured (or reinsured) that they will enter a general appearance upon Underwriters' behalf in the event such a suit shall be instituted.

Further, pursuant to any statute of any state, territory or district of the United States which makes provision therefor, Underwriters hereon hereby designate the Superintendent, Commissioner or Director of Insurance or other officer specified for that purpose in the statute, or his successor or successors in office, as their true and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted by or on behalf of the insured (or reinsured) or any beneficiary hereunder arising out of this contract of insurance (or reinsurance), and hereby designate the above-named as the person to whom the said officer is authorized to mail such process or a true copy thereof.

DATED

Farwest GENERAL AGENCY

By

35 H

SECTION 1—LOSS OR DAMAGE TO AIRCRAFT

A. The Insurers will pay for or make good accidental loss of or damage to the Aircraft whilst in flight or on the ground or on the water, including any equipment or accessories while attached to and forming a part of the Aircraft, from whatever cause arising except frost; wear and tear; corrosion; gradual deterioration; mechanical breakage or breakdown, but including accidental damage caused thereby. This Section shall include loss or damage by burglary, theft or malicious means unless it be proved by the Insurers that such loss or damage was caused by a servant or agents or person under the control of the Assured.

B. It is understood and agreed that Insurers' liability under this Section in respect of any Aircraft shall not exceed the Agreed Value, including all equipment and accessories, as set forth in Column 7 of the Schedule, subject each and every claim in respect of Flight Risks to the deductible applicable to each such Aircraft as set forth in Column 9 of the Schedule.

C. Insurance as provided under this Section shall apply only to Aircraft for which a premium charge is set forth in Column 10 of the Schedule, and **Flight Risks are insured only in respect of such Aircraft for which a specific amount of deductible is set forth in Column 9 of the Schedule.**

D. Upon the occurrence of any accidental damage hereunder the amount of insurance on the Aircraft the subject of the loss shall be reduced by the amount of such loss until the date of completion of repairs, at which date the amount of insurance shall again attach as originally written unless written request to the contrary be given to Farwest General Agency for Insurers, and reinstatement premium computed on a pro rata basis shall be immediately due and payable.

SECTION 2—THIRD PARTY LIABILITY

1. The Insurers will pay on behalf of the Assured, within the limits specified in the Schedule, all the sums which the Assured shall become legally liable to pay as compensation, including costs awarded to any claimant, caused by or through or in connection with the Aircraft described in the Schedule, or articles dropped therefrom, under that Coverage or those Coverages set forth herein for which specific limits of liability corresponding both to Aircraft and Coverage are set forth in the Schedule for each such Aircraft.

   Coverage A—Public Liability: Loss from liability imposed by law upon the Assured for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons other than Passengers, caused by accident.

   Coverage B—Property Damage: Loss from liability imposed by law upon the Assured for damage to or destruction of property (excluding property owned, rented, leased, in charge of or transported by the Assured), including the loss of use thereof, caused by accident.

   Coverage C—Passenger Liability: Loss from liability imposed by law upon the Assured for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained by any Passenger or Passengers, caused by accident.

2. The Insurers will, in addition, defend, until they elect to pay their limit of liability, in the name of and on behalf of the Assured any claim or suit, whether groundless or not, brought against the Assured and in respect of which the Assured is entitled to indemnity under this Certificate and/or Policy, provided that the Insurers shall have the right to make such investigation, prosecution, negotiation, and settlement of any claim or suit as they may deem expedient; the Insurers will pay all costs taxed against the Assured and expenses incurred by or with the consent of the Insurers in defending such claims or suits, including interest accruing after entry of judgment on that part of the judgment not in excess of the limit of liability of the Insurers. This clause does not require the Underwriters to defend any claim or suit arising in connection with a violation of this Certificate and/or Policy.
3. The Insurers will pay expenses incurred by the Assured for such immediate medical and surgical aid as is imperative at the time any such bodily injury is sustained.
4. The insurance hereby of more than one Assured (whether named or not) shall not operate to increase the limits of the Insurers' liability.
5. The Insurers shall not be liable for claims:
   (a) in respect of death of or bodily injury to any person or persons where such death or injury arises out of and in the course of the employment of such person or persons by the Assured;
   (b) in respect of death or bodily injury to any member of the Assured's household or family or imposed upon or assumed by the Assured under any Workmen's Compensation Act, Plan or Law.

DEFINITIONS

"Civil Aeronautics Authority" as used herein shall mean the duly constituted authority of the United States of America having jurisdiction over civil aviation, or, if the risk is insured in Canada, the corresponding authority of the Dominion of Canada.

"Flight Risk" shall mean risks covered by this Certificate and/or Policy and shall be deemed to commence from the time the Aircraft moves forward in taking off, or attempting to take off, for the actual air transit and shall end when the Aircraft comes to rest or commences to taxi under its own power after making contact with the ground and/or water at the conclusion of a flight.

"Ground Risk" shall mean risks covered by this Certificate and/or Policy which are not either as to nature or to time included under the definition of Flight Risks.

"Passenger" as used herein shall mean any person in, on or boarding the Aircraft for the purpose of riding therein or alighting from the Aircraft following a flight or attempted flight therein, excluding, however, any Aircraft crew member(s) while in the course of employment by the Assured.

GENERAL EXCLUSIONS

This Certificate and/or Policy does not cover:

1. Any loss, damage or liability arising from:
   (a) War, riots, strikes, civil commotions, or military or usurped power or confiscation or requisition by any Government or Public Authority;
   (b) The use of the Aircraft for any purpose, or piloting by any person, other than for the purposes and by the pilot or pilots described in the Schedule, or outside the geographical limits named therein unless due to force majeure;
   (c) The use of the Aircraft for crop dusting, seeding, spraying, hunting from aircraft, closed course racing, or student instruction unless such use is specifically approved in the Schedule, or any flying in which a waiver issued by the Civil Aeronautics Authority is required unless with the express written consent of Farwest General Agency for Insurers.
2. Any loss, damage or liability which at the time of the happening of such loss or damage or liability is insured by or would, but for the existence of this Certificate and/or Policy, be insured by any other Policy or Policies except in respect of any excess beyond the amount which would have been payable under such other Policy or Policies had this insurance not been effected;
3. (a) Loss of use of the Aircraft; (b) Personal effects; (c) Extra equipment valued in excess of $25.00 added to the Aircraft after the inception date of cover unless endorsed hereon and any additional premium required paid thereon;
4. Loss or damage due to wrongful conversion, embezzlement or secretion by any person in lawful possession of the Aircraft under a lease, conditional sale, mortgage or other contract or agreement whether written or verbal; the use of the Aircraft for any unlawful purpose if with the knowledge and consent of the Assured;
5. Loss or damage to any Aircraft described in the Schedule as a landplane which has been converted to any other type of Aircraft unless such conversion is authorized by endorsement hereto signed by Farwest General Agency for Insurers and any additional premium required paid thereon;
6. Liability assumed by the Assured by agreement under any contract unless such liability would have attached to the Assured in the absence of such agreement.

GENERAL CONDITIONS

1. At the commencement of each flight the Aircraft shall have a valid and current airworthiness certificate issued by the Civil Aeronautics Authority, and all inspections and/or maintenance prescribed by Civil Air Regulations shall have been accomplished. All requisite log books shall be kept fully completed and up to date and such documents shall be produced to Farwest General Agency for Insurers at any reasonable time should they so require in support of all or any claims hereon.
2. The aircraft shall be operated at all times in accordance with its Operations Limitations and/or C.A.A. Approved Operations Manual, and in accordance with operations authorized as set forth therein.
3. The Assured shall use due diligence and do and concur in doing all things reasonably practicable to avoid any loss or damage under both Sections 1 and 2 of this Certificate and/or Policy. In the event of the aircraft sustaining damage covered by Section 1 of this Certificate and/or Policy, the Assured or his/their accredited agents shall forthwith take such steps as may be necessary to ensure the safety of the damaged Aircraft and its equipment and accessories; and no flights other than those properly authorized under Civil Air Regulations and which are solely necessary for the safekeeping of the Aircraft shall be made prior to submission of written notice of loss to Farwest General Agency, and receipt of specific authorization from Farwest General Agency on behalf of Underwriters for such flight(s).
4. **Immediate Notice** of any event likely to give rise to a claim under this Certificate and/or Policy shall be given by or on behalf of the Assured to Farwest General Agency, Exchange Building, Seattle 4, Washington, U. S. A., to whom the Assured shall furnish full particulars in writing of such event and shall forward immediately notice of any claim by a third party and any letters or documents relating thereto and shall give notice of any impending prosecution. The Assured shall render such further information and assistance as the Insurers may reasonably require and shall not act in any way to the detriment or prejudice of the interests of the Insurers.
5. The Assured shall not make any admission of liability or payment or offer or promise of payment without the written consent of Farwest General Agency for Insurers. The rights of the Assured against other parties as respects any payment under this Certificate and/or Policy shall, to the extent of such payment, be subrogated to the Insurers, and the Assured shall execute all papers required to secure to the Insurers such rights.
6. Bankruptcy or insolvency of the Assured shall not relieve the Underwriters of any of their obligations hereunder.
7. The Insurers shall not be liable for any reward offered without the written consent of Farwest General Agency for Insurers, and in the event of loss hereunder there shall not be any abandonment of Aircraft to Insurers without their consent.
8. This Certificate and/or Policy may be cancelled at any time at the request of the Assured, in which case the Insurers, upon demand and surrender of this Certificate and/or Policy, shall refund the excess of paid premium above the customary short rate premium for the expired term. This Certificate and/or Policy may be cancelled at any time by the Insurers by giving to the Assured a ten days' notice of cancellation, said notice stating when cancellation shall be effective and shall be deemed to have been properly given if notice is addressed to the Assured at the last address stated in the Certificate and/or Policy and deposited in the United States mail, postage prepaid. Such cancellation notice is to be given with or without tender of the excess of premium above the pro rata premium for the expired term, which excess, if not tendered, shall be refunded on demand. Such cancellation shall be without prejudice of any claim originating prior thereto.
9. If the Assured shall make any claim knowing the same to be false or fraudulent as regards amount or otherwise, this Certificate and/or Policy shall become void and all claims thereunder shall be forfeited.
10. No assignment of this Certificate and/or Policy, and no waiver or change in any part of its terms, or conditions, shall be valid unless by endorsement issued to form a part hereof, signed by Farwest General Agency for Insurers.

CURRENCY CLAUSE. It is understood and agreed that all amounts used herein are in UNITED STATES CURRENCY, and that premium shall be paid and all losses shall be paid and adjusted in UNITED STATES CURRENCY.

"EXHIBIT A"

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35-E

Mr. Talbot: On this point, your Honor, of whether or not Cordova Airlines knew about this movement of explosives, the Bruce case which I cited to your Honor in the beginning holds——

The Court: Well, now, I will read those cases; I will read every one of those cases.

Mr. Talbot: In order then to help the Court on this one point of whether or not the dynamite was lawfully carried, we took the deposition of Cordova Airlines last Saturday by its president, Mr. Smith, and there are some questions and answers in that deposition that are material to the point which, your Honor, which we have been discussing today.

The Court: Well, now, the problem in this case is [35] that somebody has demanded a jury trial and I am going to have to present all these facts to the jury. I am going to have to rule upon the admissibility of whether they should go to the jury, but these facts are going to have to be presented to the jury.

Mr. Talbot: The carriage of dynamite, though, is admitted and Mr. Smith—Cordova Airlines has made certain admissions in this deposition——

Mr. Nesbett: Your Honor——

Mr. Talbot (Continuing): ——which is undisputed, and there is no need to send the question to the jury on the dynamite business, and no interpretation of the policy; that is for the Court. The overloading question, that is for the jury, but if your Honor were to decide this point in our favor we wouldn't have to have a jury trial.

Mr. Nesbett: We are not in here to argue a mo-

tion for summary judgment or any such thing; as I recall, I am in extremely short notice to determine whether two additional defenses are to be allowed to Lloyd's.

The Court: That is right and if we have a jury for the case, I think I will give it all to the jury.

Mr. Talbot: Very well.

The Court: You are presenting a pretty difficult case to the jury, but if you want to present it to the jury it's all right. All I want to do is see that they get all the [36] facts. Now, let's consider the Motion, for a moment, this Motion To Amend the Answer. Now, Mr. Nesbett, are you penalized in any way if I grant that motion?

Mr. Nesbett: I can't anticipate at all what they suddenly discovered that would cause them to bring these two defenses in at this late date, your Honor, after the case has been on file so long and I object to the—to allowing an answer of those two defenses and I will submit it to your Honor. One of them, at least, has been discussed here in some detail.

The Court: Well, I will tell you as I tell our attorneys down my way that we don't try lawsuits upon the pleadings. We try them upon the evidence and so I believe that the party should have the right to present all their case to the court or to the jury; so, I will grant your Motion To Amend.

Mr. Talbot: Thank you, your Honor.

The Court: Now, we come to the question of production of documents. Do you oppose the production of all these documents, or just certain ones that you oppose?

Mr. Nesbett: We met in my office yesterday about 4:00 o'clock and I think Mr. Talbot has been completely satisfied as to all those demands and many of them I had, and he has now at his disposal in my office to photograph and inspect and as far as I know, we have no bone of contention to [37] take your Honor's time——

Mr. Talbot: Mr. Nesbett was extremely courteous and helpful to me, your Honor, and he is going to allow me to have copies of things I need, but there is one—well, I might point out that our demand for records of the National Bank of Alaska is withdrawn because the National Bank of Alaska is withdrawing from this case. There are certain other certificates and waivers which we have—which we demanded production. Mr. Nesbett advises me that as far as he knows there are no such documents. I am pleased to think that there are no such documents, but I was wondering if—what your Honor would wish in that case. I thought maybe an affidavit from Mr. Smith that there are no such documents or some way to protect the record and protect my clients other than Mr. Nesbett's word, although I believe him implicitly.

The Court: Well, I rely upon counsel's word until I have been convinced to the contrary and I think counsel never—most counsel don't misrepresent——

Mr. Talbot: I predict you never will be disappointed with Mr. Nesbett's word, your Honor, but suppose they had these documents in the Cordova,

Alaska office and they hadn't been disclosed to Mr. Nesbett; then, where would I be?

Mr. Nesbett: That could happen alright. It makes a dangerous situation.

The Court: Well, may I do this: may I make an [38] order that Monday morning you produce and present to the Clerk for marking all documents you expect to use in this case and have them marked for identification. I'd like to have those presented before Monday if I could get them presented, but this is Friday and ordinarily in a case in which there is any documents I'd like to have all the documents in and marked and identified so we don't have to waste the time of the jury with the introduction and marking of the documents. Why can't you come in at 9:30 Monday with your documents?

Mr. Nesbett: Your Honor, I was appointed in a criminal case and I have to go in at 9:30—let's see, that is June 2nd, Monday?

Mr. Talbot: Yes.

The Court: Are you going to try a criminal case?

Mr. Nesbett: No, sir, to appear briefly for some reason or other in connection with contempt of court that grew out of some other criminal trial.

The Court: Yes, I think I read something about that. Could you come in this afternoon with your documents?

Mr. Nesbett: We have an argument this afternoon. I just finished a brief.

The Court: Well, that argument is not going to take very long, is it?

Mr. Nesbett: Well, I don't think so.

The Court: I don't know what—I am not interested [39] in authorities——

Mr. Nesbett: I don't see how he can photograph the documents that he wants in my office by this afternoon unless he'd work pretty fast.

Mr. Talbot: There is one other thing, your Honor. I sent a telegram on Tuesday to a lawyer in Washington, D. C. to get certain documents from the Civil Aeronautics Board. He wired back that he mailed them yesterday. I have never seen these documents; I don't know what they are, but they may constitute evidence——

The Court: All right, may I suggest this: on Monday——

Deputy Clerk: Eight o'clock, Judge, you have the case of Kessler -vs.- Kastner.

The Court: I am going to give sometime to that case before I take up your case and it may not take——

Mr. Nesbett: That does bring up a point on that. Counsel stipulated that the Kastner case can be handled after this one because I noticed your Honor called the jury back for Monday.

The Court: Well, I don't know why the Kastner case has to be handled after this one.

Mr. Nesbett: It doesn't have to be as far as I am concerned.

The Court: Well, I don't know, but there is some [40] problems in the Kastner case that I want to get out of the way before we ever go to trial so——

Mr. Nesbett: I think your Honor does——

The Court: So, I expect to give sometime to the

Kastner case. The trouble is, Mr. Nesbett is in both of these cases. If Mr. Nesbett wasn't in both of these cases I'd get another clerk and put you in another room and make you mark your documents while I am handling the Kastner case, but I guess I can't do that with Mr. Nesbett here.

How many documents are you going to have?

Mr. Nesbett: Well, I won't have many at all; hardly any. He's taking all that he wants out of my files and I can't anticipate any. I hope I am not bound after the evidence is in on these affirmative defenses by any rule that prevents me from submitting anything as a defense. I haven't, of course, pleaded in response to those affirmative defenses.

The Court: Well, I don't suppose we can get the documents marked before they commence trial.

Deputy Clerk: If counsel would like to meet with me tomorrow, or Saturday, we could get them marked because this case is going to take time.

The Court: Well, that would mean you'd have to open up the court and it's—we will probably wait until Monday. We will wait until Monday.

Deputy Clerk: Would you like to come in at 8:00 on [41] Monday?

Mr. Talbot: No.

The Court: Well, I think I have a pretty good understanding of the issues involved in this case——

Mr. Nesbett: There's still something——

The Court (Continuing): ——at least, enough to try to explain them to the jury.

Mr. Nesbett: Your Honor, there are still very important matters in that as far as your Honor's

study of the pleadings are concerned that will simplify this case to no end and that is the stipulations we have just entered into this morning and signed and——

The Court: Well, I understood you were going to file them but I didn't know they were ready to be filed.

Mr. Nesbett: Well, they're handwritten but we thought we'd give you a copy now.

The Court: I'd like to have them.

(Thereupon, the Court was handed a copy of the above-mentioned stipulations.)

The Court: Well, you be back here on Monday morning and sometime Monday morning we will probably be able to start this trial. I hope we get a jury before noon on Monday. Judge McCarrey is having a jury trial, I believe, on Monday and so I probably will wait until after he gets his jury before I can do anything, but in the meantime I will discuss this [42] other case.

Mr. Nesbett: Could I give your Honor two citations that occurred to me?

The Court: I'd be very happy to have your citation.

Mr. Nesbett: 163 Atlantic, 713. Does your Honor care for titles?

The Court: 163 Atlantic, 713?

Mr. Nesbett: Yes.

The Court: No, I don't care about the titles.

Mr. Nesbett: Concerning the difference between "exclusions" and "exceptions" in the policy, and

your Honor, 151 Southwestern at 91, the definition of the phrase "reasonably practicable"; likewise a California case, 55 Pacific Sec. 1195.

The Court: What was the volume?

Mr. Nesbett: 55.

The Court: 55?

Mr. Nesbett: Yes, sir.

The Court: 1195?

Mr. Nesbett: Yes, sir, "reasonably practicable" again. That's all then.

Mr. Talbot: Your Honor, these two books of regulations that I am quoting from belong to the Court. I can return them.

The Court: Are they in the library?

Mr. Talbot: I will return them to the library immediately. [43]

The Court: All right. I wish you would, because I may have a chance to look at them this afternoon.

Mr. Talbot: I was wondering what your Honor's practice is with regard to special interrogatories to a jury?

The Court: I never give them.

Mr. Talbot: Thank you.

The Court: And, also, I might say to counsel that if you have any questions you want put to the jury, please present them in writing and I will be glad to put them to the jury and I would like to have your jury instructions at the beginning of the trial.

Mr. Nesbett: Before you adjourn, your Honor, may I file that (indicating)? It's in connection with the case we are having at two o'clock.

The Court: Yes, it may be filed.

Mr. Talbot: I'd also like to file our trial memorandum in the Cordova case.

The Court: Let me have both of them.

(Thereupon, the Court was handed both of the above-mentioned documents.)

The Court: Court will now stand in recess until two o'clock this afternoon. [44]

(Thereupon, at 12:00 o'clock a.m., Court was recessed, this case to be resumed at 10:00 o'clock a.m., Monday, June 2, 1958.) [45]

The Court: 12,349, Cordova Airlines versus Underwriters at Lloyd's.

Mr. Nesbett: Plaintiffs are ready, your Honor.

Mr. Talbot: The Defendants are ready, your Honor.

The Court: You may call the jury.

(Whereupon, the Deputy Clerk proceeded to draw from the trial jury box, one at a time, the names of the members of the regular jury panel of petit jurors and counsel for both plaintiff and defendant examined and exercised their challenges against said jurors, until the jury of twelve was completed and counsel for plaintiff and counsel for defendant stipulated that a verdict of less than twelve jurors may be received in case of illness, disability, or other good cause for excusing one of the jurors and that it is therefor unnecessary to draw the names of alternate jurors in the cause. Where-

upon, said jury was duly sworn to well and truly try the cause and a true verdict render in accordance with the evidence and the instructions of the court, after which the following proceedings were had:)

The Court: May I inquire of counsel, have you instructions? Have you written instructions?

Mr. Talbot: Yes.

Mr. Nesbett: Yes.

The Court: I'd like to have your instructions because I start working on your instructions the minute we start the case and my rulings on objections depends a great deal upon the issues raised in your instructions.

Mr. Nesbett: Your Honor, I just have—my [47] secretary just brought some in. I wonder if we could have a 5-minute recess?

The Court: Ladies and gentlemen of the jury, we are about to take a recess. It is my duty to admonish you that you are not to discuss this case with anyone and you are not allowed to have anyone discuss it with you until the rights of the parties have been finally submitted to you. With that admonition we will now recess until 10 minutes after 11 o'clock.

(Whereupon, at 11:10 o'clock a.m., June 2, 1958, court reconvenes following a 10-minute recess, the jury having resumed their places in the jury box, and the following proceedings were had):

The Court: Is it stipulated the jury is present in the box?

Mr. Talbot: Yes, your Honor.

The Court: Do you want to make an opening statement?

Mr. Nesbett: Your Honor, Mr. Talbot and I have agreed that probably at this time it might be wise to read into the record certain stipulations that we have entered into.

The Court: You can. Before you make the opening statement?

Mr. Nesbett: Yes, your Honor.

The Court: All right. I might say to the [48] jury that when counsel agrees to the facts and stipulate to it that you are to take those stipulations as facts conclusively proved, no doubt in your mind, that when the stipulation is made that you don't have to worry any more about the proof of the facts as to those particular stipulations.

Mr. Nesbett: Your Honor, counsel for the parties have agreed to stipulate that Cordova Airlines has complied with all conditions precedent to the commencement of this suit; they have agreed that the airplane, the subject of this suit, was almost totally destroyed on December 18, 1955.

They have agreed to the dismissal of the action against Farwest General Agency, Inc., as to the second and third cause of action but agree also that Farwest shall be retained as a party defendant as a possible insurer as to the first cause of action. The parties expect a telegram from Farwest during the

course of this trial that will reflect further on the advisability of their remaining a party.

The parties have agreed through counsel that Cordova Airlines is duly qualified or is a duly qualified corporation.

Counsel for the parties have agreed that D. K. McDonald, Inc., is properly licensed as a broker in Alaska.

Counsel for the parties have agreed that any gasoline found by the jury to have been in the tanks on board aircraft N1569 "Charley" at the time of its crash weighed 6 pounds per gallon. [49]

The parties through counsel have agreed that the second and third cause of action set out in the Complaint be dismissed.

The parties through counsel have agreed that the following additional underwriters be joined as defendants in the suit and the Complaint be deemed amended accordingly: Victoria Insurance Company, Ltd., Orion General Insurance Company, Ltd., and Eagle Star Insurance Company, Ltd., in proportion to their burden of any loss that might be found, they might be found liable for according to an agreement between them.

The parties through counsel have agreed that the certificate of insurance provided $16,000.00 in coverage, less $800.00 as a deductible clause or a net coverage of $15,200.00, to which Cordova Airlines is entitled if the underwriters are ultimately found liable.

The parties through counsel have agreed that the

dynamite on board the aircraft N1569 "Charley" at the time of the crash did not explode.

The parties through counsel have agreed that a certain face sheet of the certificate of insurance as pleaded in the Answer contained a portion of the terms of the certificate issued for the period in question. A copy of that face sheet has been given to your Honor.

The parties through counsel have [50] additionally stipulated that the dynamite carried on the flight in question weighed 50 pounds net per carton and that a carton to be produced at the trial by counsel for the underwriters is typical of those cartons carried on the flight in question.

The parties through counsel have stipulated that by the terms of an applicable contract with the United States Air Force, all supplies and materials purchased by Morrison-Knudsen Company for the Big Mountain site were to become the property of the United States Government immediately upon purchase.

Parties through counsel have stipulated that the defense of the underwriters alleging a violation of the terms of the policy because a certain wheel-ski arrangement had been installed on the plane without being approved by the proper CAA designee be withdrawn as a defense.

And lastly, the parties have stipulated through counsel that your Honor, Judge Westover, has the consent of both sides to try this case and both sides waive any matter or question of jurisdiction or the power of the Court to try the case.

I believe that is all, unless I overlooked one.

Mr. Talbot: Yes——

The Court: Well, I understand from the—did you want to say anything?

Mr. Talbot: I just wanted to add for the record that Mr. Nesbett has stated exactly and precisely the stipulations [51] between counsel.

The Court: Well now, I understand then from the statements of counsels' stipulations, the stipulation that there are only two defenses here and that is overloading and the carrying of dynamite?

Mr. Talbot: No, your Honor. There are three defenses. The third defense—should I state it?

The Court: Yes.

Mr. Talbot: The third defense is that on the flight in question, in order for the flight to have been lawfully made the airlines should have secured a waiver from the Civil Aeronautics Authority, and the policy provides that in order for coverage to be afforded on a flight for which a CAA waiver is required, that the airlines must in addition secure the express written consent of Farwest General Agency of Seattle as agent for the defendant underwriters. That is the third defense.

The Court: Well then, I understand now that there is coverage except for these defenses?

Mr. Talbot: That is correct, your Honor.

The Court: You admit that if these defenses are not good then there is coverage, the insurance companies would be liable?

Mr. Talbot: If none of the three defenses were good, that is right, your Honor.

The Court: Mr. Nesbett, do you want to make an [52] opening statement?

Mr. Nesbett: Yes, your Honor.

(Thereupon, opening statements were made by counsel for plaintiff and counsel for defendant, after which the following proceedings were had):

The Court: I might say to the jury that statements of counsel are not evidence in this case, that at the beginning of the case counsel has the right to make an opening statement. An opening statement is nothing less than a statement of the lawyers as to the facts they expect to prove. It's been my experience that sometimes lawyers get over enthusiastic and say they are going to prove more than they actually prove, which you remember. You are to judge this case from the testimony of the witnesses, not from the statements of counsel.

At the end of the case counsel has the right to argue the case to the jury. Again, the argument of counsel is not evidence. It is only their opinion as to what the evidence proves. You are the sole judges of the evidence in this case. I can't judge the evidence. The attorneys can't judge the evidence. This is your duty, and the evidence must be judged from the testimony that is produced before you—the testimony of the witnesses, stipulations of counsel, documents that are introduced. I think we ought to have introduced in this case the policy, don't you think, the policy and the exceptions? [53]

Mr. Nesbett: I think it was introduced, your Honor, as Plaintiffs Exhibit A.

The Court: It's already been introduced? All right.

Mr. Nesbett: Plus the face sheet we have mentioned.

The Court: All right. You may proceed, Mr. Nesbett.

Mr. Nesbett: I will call Mr. Merle Smith.

MERLE K. SMITH

called as a witness for and on behalf of the Plaintiffs, and being the plaintiff, testifies as follows on

Direct Examination

By Mr. Nesbett:

Q. State your full name, please, Mr. Smith?

A. Merle K. Smith.

Q. What is your business?

A. President of Cordova Airlines.

Q. Mr. Smith, how long have you lived in Alaska? A. 21 years.

Q. And how long have you been associated with Cordova Airlines? A. Since 1937.

Q. And in what capacity did you associate yourself with Cordova Airlines in 1937?

A. As a pilot.

Q. And how long had you been a pilot at that time, that is, as of 1937? [54] A. Since 1928.

Q. And when did you become president of Cordova Airlines? A. In 1939.

(Testimony of Merle K. Smith.)

Q. As president of Cordova Airlines were you at all engaged in flying as a part of your activities?

A. Yes, I continued on as a pilot from '37 up until about 6 years ago.

Q. Now Mr. Smith, when did you—or rather I will ask you how many airplanes did Cordova Airlines own when you became president?

A. Two.

Q. How many airplanes does Cordova Airlines own at the present time? A. Ten.

Q. And does Cordova Airlines have any certificates issued by the Civil Aeronautics Board?

A. Yes.

Q. And will you state what certificates have been issued to Cordova?

A. We have certificates, Valdez—Anchorage, Valdez—Cordova, and a route up through the Copper River Valley into Chisana, taking in about 8 points, and we have a route now to Seward and also a route, 14 stops, in Prince William Sound. And we also have Gulkana, now.

Q. Now calling your attention to the month of December, 1955, [55] did Cordova Airlines own any Cessna 180 airplanes? A. Yes.

Q. How many? A. Three.

Q. Did Cordova own an airplane registered as N1569 "Charley"? A. Yes.

Q. And did you have occasion during the month of November of 1955, to charter that airplane in any fashion?

(Testimony of Merle K. Smith.)

A. Yes, we entered into a contract with Morrison-Knudsen Company.

Q. Would you state briefly the parties to that contract and the duties that Cordova Airlines was to perform?

A. The parties to the contract was—we had a contract with Morrison-Knudsen, who were subcontractors for Western Electric and the Air Force. And the duties—our duties—were to place the airplane at the disposal of Morrison-Knudsen personnel at—in the vicinity of Iliamna Lake.

Q. Was the purpose that the airplane was to be used for indicated or stated in the contract or the arrangement you entered into?

A. No. We were just to fly it as they instructed us to and that was our instruction to the pilot.

Q. As who instructed you to?

A. As the bosses, the superintendents of MK in Iliamna, that region. [56]

Q. MK is Morrison-Knudsen Company, is it?

A. Yes.

Q. Was Cordova Airlines obligated to furnish the pilot of the airplane in connection with that contract?

A. We were to furnish a pilot, do the maintenance, and the gasoline and oil.

Q. And what was the compensation arrangement between Morrison-Knudsen Company and Cordova?

A. We were to be paid on an hourly basis with the guarantee of 3 hours a day whether we could fly or not.

(Testimony of Merle K. Smith.)

Q. Mr. Smith, what pilot did you assign to that airplane to carry out your obligation under the contract? A. Herbert Haley.

Q. And will you state how long Herbert Haley had been a pilot with that airlines, that is Cordova Airlines, since December, 1955?

A. I hired him first in 1942 and he was practically a continuous employee of the company from that time on. I think he left during the war for 18 months or 2 years and then he come back and outside of furloughs and so on, why he was pretty much with us all the time.

Q. How long had you known Mr. Haley?

A. Since 1924.

Q. Do you know how long he'd been a flyer?

A. I beg your pardon. I met him in 1924 and he —I don't [57] exactly know, but he'd been flying several years then. He was considered an experienced pilot.

Q. Were you a pilot in 1924 at the time you met Mr. Haley? A. No.

Q. Now, do you know how many hours of flying time or experience Mr. Haley had until the time he was assigned to this contract in Iliamna with the 180?

A. He had in excess, I believe, of 12,000 hours.

Q. Now, you did and it has been agreed that you had insurance covering this airplane 1569 "Charley," is that not correct? A. Yes.

Q. And with whom did you deal in effecting that coverage?

(Testimony of Merle K. Smith.)

A. We dealt with our local broker, Coffey-Simpson Agency, now Insurance, Incorporated.

Q. And you know now, of course, that the Coffey-Simpson Agency arranged coverage through Farwest General Agency in Seattle who in turn arranged coverage with Lloyd's of London and Eagle Star Insurance Company, Ltd. and Orion Insurance Company, Ltd. and the one other insurance company, Victoria Insurance Company, Ltd., all to share in the loss if any occurred for which they were responsible on this airplane, don't you?

A. Yes.

Q. And it has been agreed that that airplane was totally destroyed? You know that as a fact, don't you? [58] A. Yes.

Q. The stipulation says "practically destroyed." Did Cordova Airlines—was Cordova Airlines able to salvage any of the parts from the wreckage of that airplane? A. No.

Q. Mr. Smith, as a result of the insurance coverage mentioned by the policy which is Exhibit A, and the loss of the airplane, did you make any demand for payment of the proceeds of the policy to you to cover the loss? A. Yes, we did.

Q. And did you receive any payment from the underwriters? A. No.

Q. Did the underwriters deny liability?

A. Yes.

Mr. Nesbett: I believe that is all, your Honor.

The Court: Cross-examine.

(Testimony of Merle K. Smith.)

Mr. Talbot: No questions, your Honor. We may want to call Mr. Smith later as an adverse witness.

The Court: All right. I wonder, Mr. Smith, if you will stay. I suppose you will stay in attendance of this trial until we finish up? A. Yes, sir.

The Court: I notice it's pretty near 12 o'clock and if you have a short witness we will proceed with that short witness, otherwise I think we will take a recess now until after [59] lunch.

Mr. Nesbett: I would prefer the recess, your Honor. I think I will rest my case.

The Court: All right. I might advise that the members of the jury who are not now in the box may be excused until next Monday morning at 10 o'clock. Will you return to this department next Monday morning without any further notice? The court will now stand in recess until 2 o'clock this afternoon.

(Whereupon, at 11:50 o'clock a.m., June 2, 1958, the court continues the cause to 2:00 o'clock p.m. of the same day.)

(At 2:00 o'clock p.m., counsel for the Plaintiff being present and counsel for the Defendant being present, the trial of said cause was resumed):

The Court: Is it stipulated that the jurors are present in the box?

Mr. Nesbett: Yes, your Honor.

Mr. Talbot: Yes, your Honor.

The Court: You may proceed. Mr. Nesbett, are you——

Mr. Nesbett: Your Honor, the Plaintiff rests.

Mr. Talbot: Your Honor, I would like to advise the court of two further stipulations which have been entered into by counsel.

The Court: All right. [60]

Mr. Talbot: The first is that the action may be dismissed with prejudice as to the Plaintiff National Bank of Alaska and without cost, and the second is that the action may similarly be dismissed as to the Defendant D. K. McDonald Company, d/b/a Farwest General Agency. And I can advise the court and wish to, that at 12 o'clock I received telegraphic authority from Seattle authorizing me to appear in defense for the three underwriters other than Lloyd's of London. And counsel have stipulated that the Answer may be deemed to be amended to include and assert the same defenses on behalf of those three underwriters.

The Court: Such may be the order.

Mr. Talbot: Your Honor, before proceeding with the first witness for the Defendants I wonder if we might approach the bench?

The Court: All right.

(Whereupon, counsel for the plaintiff and counsel for the defendant approached the bench and the following proceedings were out of the hearing of the jury):

Mr. Talbot: Your Honor, Mr. Nesbett and I have a serious disagreement as to the admissibility of certain documentary evidence which was furnished to the Defendants by the Civil Aeronautics Board

in Washington. I do not want to prejudice the jury against——

The Court: You don't want to what? [61]

Mr. Talbot: Want to run the risk of prejudicing the jury against the Plaintiff by going into the question of the Civil Aeronautics Board documents in the presence of the jury, but I do have several regulations, statutes and a couple of case decisions that I would like the Court to consider in connection with these documents and also perhaps refer to the report of the Civil Aeronautics Board which I don't think is proper to do before the jury.

The Court: Well, why don't you offer them and if there's any objection I'll rule upon the objection.

Mr. Talbot: Very well.

Mr. Nesbett: Your Honor, I appreciate his thought on it and I can see where there will be a number of documents that he would like to introduce. I intend to object. We have gone over it and he knows which ones I object to and I think that——

The Court: Would you rather have the objections outside of the presence of the jury.

Mr. Nesbett: I believe so, your Honor, and then we could go into the whole matter right there.

The Court: All right. I will excuse the jury and you can present your documents and I will rule upon them.

(Thereupon, when the discussion was completed counsel for the plaintiff and defendant resumed their seats and the following proceedings were had in the presence of the court and jury): [62]

The Court: Ladies and gentlemen of the jury, a question of law has arisen and as you are not concerned with the law in this case but only with the facts, I am going to ask that you retire to the jury room until we can dispose of the questions of law. As soon as we can dispose of those questions you will be called back into the jury box. I don't anticipate it will take very long, but you never can tell when attorneys start to argue. Will you retire from the jury box as quietly as possible?

(Whereupon, the jury left the jury box and retired to the jury room to await being called, and the following proceedings were then had in the absence of the jury):

The Court: Now, the documents you want to present—supposing you give them to the Clerk and have them marked for identification and then we can have them in the record.

Mr. Talbot: Your Honor, there are two particular documents which are in dispute. There are others of which I think we may have the original available in Mr. Nesbett's file. But these two—the first one is a letter addressed to the Civil Aeronautics Board.

The Court: Well now, let's have it marked for identification and then I'll look at it and you can——

Deputy Clerk: This is Defendants B for Identification, A being the face sheet. [63]

The Court: A is the policy?

Mr. Talbot: No, that would be Plaintiffs Exhibit 1 if it's anybody's.

Deputy Clerk: Pardon me—A being the Civil Aeronautics Board certified copy of the regulations.

Mr. Talbot: Very well. Yes.

Deputy Clerk: This will be Defendants B for Identification.

Mr. Talbot: Very well. Thank you.

Mr. Nesbett: Defendants A was the Civil Aeronautics Board——

Deputy Clerk: Right.

Mr. Nesbett: What was the policy? I thought that was Exhibit A?

Deputy Clerk: That was Plaintiffs 1, was Exhibit A of the Complaint and the face sheet of the policy, was it not?

The Court: Well, we ought to have the policy marked as Plaintiffs Exhibit 1.

Deputy Clerk: I have seen no policy except——

Mr. Talbot: We don't have the actual original policy.

The Court: Well, are we—we are just interested in the exceptions. Can the exceptions be—can the back of the policy be marked as Plaintiffs Exhibit 1?

Mr. Nesbett: Well, the photostat of the policy that is attached to the Complaint plus that face sheet is the policy. [64]

Deputy Clerk: And it's Plaintiffs 1.

The Court: All right.

Mr. Nesbett: And Defendants——

Mr. Talbot: And this will be Defendants C for Identification.

Mr. Nesbett: The CAB orders are what?

The Court: Exhibit A.

Deputy Clerk: Defendants A.

Mr. Talbot: I believe these photographs may be marked as one exhibit. They are numbered serially, themselves.

The Court: Just a minute. Have you got the B and C marked?

Deputy Clerk: I will have in just a moment.

The Court: Let her get it down. You can't go any faster than the Clerk can go.

Deputy Clerk: Now, D was in series, Mr. Talbot?

Mr. Talbot: Yes.

Deputy Clerk: D was one exhibit in series?

Mr. Talbot: Yes.

Deputy Clerk: Comprised of 9 photos?

Mr. Talbot: Correct. E is a map. There's one more which will be F.

The Court: Are these all the exhibits?

Mr. Talbot: Yes, your Honor, assuming that Mr. Nesbett is able to produce the originals of 3 more that I have, but I [65] think the original would be preferable evidence in that case if he has them.

The Court: Well, Mr. Nesbett, what is your objection to Exhibit B?

Mr. Nesbett: What is Exhibit B, your Honor?

The Court: Well, I'm sorry—don't you have copies?

Mr. Nesbett: No, sir, and I couldn't tell.

The Court: All right, look at it.

Mr. Nesbett: (Short pause). I have no objection. It's the first time I have seen it.

The Court: It may be received in evidence. Well now, how about Exhibit C?

Mr. Nesbett: What was that, your Honor? (The exhibit was handed to counsel). I object to it because it hasn't been identified. As far as I know—the signature of Poppas may be Poppas' signature. Whether he is a witness to identify the letter, I don't know, but I certainly object to agreeing that it go into evidence at this stage, your Honor. It purports——

The Court: May I have that a minute? (The exhibit was handed to the Court).

Mr. Nesbett (Continuing): ——purports to outline the loading of the aircraft.

The Court: Well, do you have any dispute that there was hauled on the date of the crash 16 boxes of dynamite?

Mr. Nesbett: Why, certainly, your Honor. [66]

The Court: Oh, there's——

Mr. Nesbett: Oh, my goodness, yes. And I expect of course, Lloyd's will attempt to prove that the plane was overloaded. Whether there were 16 boxes on board is a vital fact.

The Court: Well, counsel, I don't know whether you can have this admitted in evidence or not. Where is your authority?

Mr. Talbot: First authority I'd like the Court to consider is a Civil Aeronautics Board regulation.

The Court: Well, now, Civil Aeronautics Board is not running the court, and where is your authority for the introduction of this document?

Mr. Talbot: Very well, we will turn to an Act of Congress, then, your Honor. Title 28, United States Code Annotated, Section 1732(b).

The Court: All right. Well, that's perfectly all right, but to introduce any documents under 1732(b) you have got to lay a foundation.

Mr. Talbot: Yes, your Honor.

The Court: Have you got any witness here who can lay the foundation?

Mr. Talbot: I think perhaps I can lay a foundation sufficient to satisfy your Honor. I would be agreeable to being sworn, as far as that goes, or I can advise the Court how the document came into my possession. [67]

The Court: Well, that's not the problem here. This is related to the records kept in the regular course of business.

Mr. Talbot: Yes, your Honor.

The Court: Now, are you going to have to have someone testify that this was kept in the regular course of business and that it was customary to keep such records that come out of the files of the company.

Mr. Talbot: No, your Honor. This document was kept in the regular course of business of the United States Civil Aeronautics Board and it is to that point that I have these authorities to refer to, your Honor. And section 1732(b) specifically refers to a photostatic copy of any record kept in the usual course of business or activity by a Government agency.

The Court: It's not the question of a photostatic copy. You have no objection to that, do you, Mr. Nesbett, to the photostatic copy?

Mr. Nesbett: The letter itself, if the letter itself is admissible of course not, your Honor, but as near as I can see, if that is admitted there's John Poppas or whoever it is signing the letter stating a fact that actually is an issue before the Court. Not under oath, and not even in court.

The Court: Who is John Poppas?

Mr. Talbot: John Poppas is an official of, an employee of Morrison-Knudsen Company, not a party to the action.

The Court: Where is he? [68]

Mr. Talbot: I believe he's available in town, your Honor.

The Court: Well, you'd better have him here, then, rather than have this letter. I think the Plaintiff should have a right of cross-examination.

Mr. Talbot: I will assist Mr. Nesbett in getting Mr. Poppas, but your Honor, the statute provides that the knowledge——

The Court: Well, listen—it's not assisting Mr. Nesbett to get Mr. Poppas. This is an important witness. You'd better have him here. You don't want to assist him—it's your witness.

Mr. Talbot: Well, your Honor, we rely on the statute that says that the knowledge of the person making the report shall go to the weight, but not the admissibility of the document. And I have a case in point on CAB records just such as this one.

The Court: What's your case?

Mr. Talbot: 97 Federal Supplement 461. May I quote part of a paragraph?

The Court: 97 Federal Supplement 461?

Mr. Talbot: Yes, sir. It's a decision by Judge Laws, Chief Judge of the District Court for the District of Columbia. Page 461, Judge Laws says:

"The Civil Aeronautics Act, as amended, makes express provision for written reports to the Civil Aeronautics Board. If the facts contained in them were intended to be withheld from [69] the party injured in a crash or from the Court in a suit brought by such party, it would have been a simple matter to refer to them specifically. Yet the Act refers only to "reports of the former Air Safety Board or the Civil Aeronautics Board" as being exempt from use. It is true mention is made in the statute of investigations by the Board, but the language readily may be construed to make privileged only reports of the investigations, not information received in the course of the investigation."

The other authority I'd like to refer the Court to is 183 F. 2d, 467, in which the Court of Appeals for the Third Circuit in 1950 held that it was error for the District Judge not to allow in evidence a copy of the report of the Bureau of Mines of the Department of Interior, even though that report contained conclusions of the Board based admittedly on hearsay as well as personal observations.

The Court: Well, this is not a report of the Civil Aeronautics Board. This is a letter written by Morrison-Knudsen Company.

Mr. Talbot: That's true, your Honor.

The Court: This is not even written to the Board. This is written to the contracting and claims

section. Contracting claims section of what? It may be even written to the contracting claims section of Morrison-Knudsen Company.

Mr. Talbot: Your Honor, I can show that that document was furnished to us as part of the report of the Civil Aero—of [70] the file of the Civil Aeronautics Board and that that document is specifically referred to by number and reference in the report of the Board.

The Court: All right, counsel. You better see if you can locate Mr. Poppas. If you can locate Mr. Poppas then he can come in and testify as to the number of boxes that were hauled on that day. If you can't locate him then we will discuss the question whether you can get this into evidence.

Mr. Talbot: Very well, your Honor.

The Court: But I would suggest that you get out a subpoena right now. Don't wait until tonight. I suggest you get it out right now and try to locate Mr. Poppas and subpoena him in here.

Mr. Talbot: All right, we will endeavor to do that, sir.

The Court: Now, I will ask opposing counsel if he has any objection to Exhibit D. Exhibit D happens to be photographs of the wreck.

Mr. Nesbett: Nine photos. Yes, your Honor. Mr. Talbot showed me those. I object to those as not being authenticated in any fashion, your Honor, not identified as being representative of the scene of the crash.

The Court: Well, you have to lay a foundation

on D. Now, we have Exhibit E, which is a map. Do you have any objection to E? [71]

Mr. Nesbett: No; we have discussed that, your Honor, and I think it would be helpful to the Court and jury.

The Court: E may be admitted into evidence. Now we have F.

Deputy Clerk: Counsel hasn't seen F.

The Court: Will you look at F and see?

Mr. Nesbett: (Short pause.) Yes, I object to this one, too, your Honor. I suppose it's a part of the report that Mr. Talbot refers to as having been made by the CAB but doesn't indicate on the sheet anything other than a computation in connection with the Cessna 180. I don't know who made it, how authoritative it is and whether it applies to the particular 180 that we are concerned with here, whereas it was equipped and flown on the day of the flight.

The Court: Well, you're going to have to lay a foundation, aren't you?

Mr. Talbot: I think it does describe the Cessna 180 in question.

The Court: Supposing it does?

Mr. Talbot: Here again this is a record furnished us by the Civil Air Board from their files and I contend it's admissible under that statute without any more——

The Court: Well, there's nothing to show that it was furnished you from the files, Civil Aeronautics files, except your statement. There's nothing to show. [72]

Mr. Talbot: That is true, your Honor, and I'd be very pleased to be sworn and testify on that point at this time.

The Court: Well, you may be sworn and testify if you wish as to these two documents. That's C and F.

ARTHUR D. TALBOT

takes the witness stand for and on behalf of the Defendants, and, being first duly sworn, testifies as follows on

Direct Examination

Mr. Nesbett: Your Honor, I want to be entirely fair with Mr. Talbot and this is material testimony, your Honor. It's important testimony. Your Honor, this is evidence you might say that came out of a report made by a Safety Inspector for the Civil Aeronautics Board who is not here to testify what he put down on paper, is not subject to cross-examination his calculations, his correspondence or anything else in connection with what he did and reported on as a result of this accident. Now, if Mr. Talbot wants that to go in and takes the stand to make it admissible, if he is able to cure any objection, your Honor, I don't feel that I can waive my right to object to his arguing the case at the conclusion of the trial. I want to warn him now so that it wouldn't catch him unaware at the time he's ready to state his case to the jury.

Mr. Talbot: Your Honor, my testimony will have only to do with identification of documents.

The Court: I know, but what does the rule say?

(Testimony of Arthur D. Talbot.)

What [73] does the rule say? Can you testify and then argue? You're on the horns of the dilemma now, if you want to argue the case. What's the rule?

Mr. Nesbett: As I understand the rule—I am not able to quote it to your Honor—but if counsel voluntarily takes the stand on a material point he's not permitted to argue the case over opposing counsel.

The Court: Is that Alaska rule, or——

Mr. Nesbett: Let's see—whether it's Territorial laws or rule of the court or both—let me think. It's in the Territorial Code, your Honor, and it's under Civil Procedure and it's under arguments of counsel at the conclusion of the case, but it would be under the general heading, I believe, Civil Procedure in index of Volume. I think, your Honor, you have—under the rules, under supplement——

The Court: Maybe you can find it for me.

Mr. Nesbett: It would be an old, fat blue volume, numbered 3. That volume you have is a supplement.

The Court: Oh, you mean this?

Mr. Nesbett: Yes, sir.

The Court: All right. Well, Mr. Nesbett, you are more familiar with this than I am. Will you come up here and find it for me?

Mr. Nesbett: Yes, your Honor. (Counsel so complied.)

Mr. Talbot: May I see Exhibit C, your [74] Honor?

(Testimony of Arthur D. Talbot.)

Mr. Nesbett: This may be also in the local rules, your Honor.

The Court: Well, local rule 3(a)(6) says: "If counsel for either party offers himself as a witness on behalf of his client and gives evidence on the merits of the trial, he shall not argue the case to the jury unless by permission of the Court." Well, it's within the discretion of the Court, isn't it?

Mr. Nesbett: I understood it if he couldn't do it over the objection of opposing counsel. I could be wrong on that.

The Court: It doesn't say so.

Mr. Nesbett: Well, I don't see anything in the Territorial law on it so that must be the rule.

The Court: Well, it's purely within the discretion of the Court and if the purpose of the witness is to identify documents I would think my discretion would be to allow him to argue the case to the jury. I would think I would; I don't know what he's going to testify to, but I assume he's only going to lay a foundation for the identification of documents.

Mr. Nesbett: Which may result in the admission of the documents. I don't know—which, if it does, it amounts to bald statements of opinion on vital issues.

The Court: Well, we have got a jury here to try the facts of this case and the jury is not present. We will let [75] the counsel testify and at the proper time you can make the objection. I will rule upon the objection.

(Testimony of Arthur D. Talbot.)

Mr. Talbot: Your Honor, one reason I asked that the jury be excused was because I thought I might end up on the stand and I didn't want them to get the impression that anything in this case depended upon me as far as evidence goes.

The Court: You know there is a recent case that's come down from the Ninth Circuit that is relative to this particular rule and the Ninth Circuit points out that all documents, just because they are in the file, are not admissible, but I don't know whether that applies here or not.

Deputy Clerk: Now, so that my record may be straight, Mr. Talbot is testifying re Exhibits C and D?

Mr. Talbot: Right.

The Court: You have been sworn, haven't you?

Mr. Talbot: Yes, your Honor. May I give my testimony in narrative form?

The Court: I have no objection.

Mr. Nesbett: I have no objection.

By Mr. Talbot:

My name is Arthur D. Talbot. I am an attorney at law permitted to the bar of this court and I am of counsel for the Defendants in this case. I reside at 2300 Lord Baranof Boulevard in Turnagain, Spenard, Alaska.

On May 27, 1958, I addressed the following telegram [76] to Attorney Courtney Whitney, Jr., an attorney at law in Washington, D. C. This telegram

(Testimony of Arthur D. Talbot.)

is the only communication that I have ever had with Mr. Whitney in regard to this case. I, in fact, have never met Mr. Whitney but know him to be a friend of one of my associates. The telegram which I sent on May 27th reads as follows:

"Courtney Whitney, Jr., McCracken, Collins and Whitney, 1000 Connecticut Avenue, Washington, D. C. We represent underwriters at Lloyd's in the suit against Cordova Airlines which is set for trial June 2. Parties unable to locate original exhibits furnished to Civil Aeronautics Board. Urgently request you immediately secure and send us airmail special delivery at Anchorage original or copies of all exhibits attached to investigation report of CAB Investigator George R. Clark, dated February 26, 1956, except regulations which we possess. We also possess copy of Clark's report. The exhibits we need are in the custody of James N. Payton, Chief Bureau of Safety, Civil Aeronautics Board, Washington. Utmost. Thanks for your immediate attention to our request. Best regards. Boyko, Talbot and Tulin."

The following day, May 28, 1958, I received the following telegram:

"Boyko, Talbot and Tulin, Turnagain Arms Building, Anchorage. Exhibits being reproduced earliest mail May 29. Photographs possibly delayed. Good luck. Whitney." [77]

About an hour later, also on May 28, 1958, I received the following telegram addressed to our firm. The telegram reads as follows:

(Testimony of Arthur D. Talbot.)

"Exhibits mailed photographs tomorrow. Whitney."

On the following day, May 29, I received in the mail, airmail, special delivery, apparently from Mr. Whitney in Washington, according to the postmark and the address on the package, a group of photostats including Defendants Exhibits C and D for Identification. Two days later, on June 1—correction—on May 31, 1958, I received the photographs which have already been—strike that. They have not yet been received; that's the other exhibit. I threw away the cover under which the photostats came to me, but I saved the cover under which the photographs came on May 31, and I can show that to your Honor. I have in my possession a photostatic copy of the report of Investigator Clark and I have checked the exhibits which I have received from Mr. Whitney in Washington against that report. That's where Mr. Clark refers, for example, to Exhibit 10 as he does on page 6 of his report. Mr. Clark's report reads as follows:

"Records maintained by the Morrison-Knudsen Company reference Exhibit 10 indicate that the start of operations on 12/17/55 disclose there were 58 cartons of dynamite stored in the magazine Iliamna Bay airstrip and that on 12/17/55 Pilot Haley moved 30 cartons of dynamite on 2 flights, 14 cartons on [78] the first flight and 16 cartons on the second flight. The records further indicate that there were carried 16 cartons on board N1569 Charley for the flight involved in this accident. A

(Testimony of Arthur D. Talbot.)

physical check of the Iliamna Bay magazine by Morrison-Knudsen personnel subsequent to the accident disclosed that there were 12 cartons of dynamite remaining in the magazine. There were no other movements of explosives from the Iliamna Bay magazine other than those accomplished by Pilot Haley.''

Similarly, your Honor, the photographs are referred to throughout Mr. Clark's report and reading the report and viewing the photographs it seems apparent, to me at least, that these are the photographs that Mr. Clark was talking about.

I have no further testimony on this point.

ARTHUR D. TALBOT

testifies as follows on:

Cross-Examination

By Mr. Nesbett:

Q. Mr. Talbot—may I see Exhibits C and D, your Honor? (The exhibits were handed to counsel.) You've never met this attorney in Washington, D. C., have you? A. Never have.

Q. You don't know him; he is just a friend of your associate?

A. Yes; we have one other case in which Mr. Whitney is doing some work for a client of ours.

Q. Have you attempted to locate Mr. John [79] Poppas?

A. I have. I have talked to Mr. Poppas in the last few days.

(Testimony of Arthur D. Talbot.)

Q. And you do not want to produce him as a witness. Is that the reason he is not called here to identify this letter which is Exhibit C?

A. As I interpreted the statute, perhaps wrongly, I thought that Mr. Poppas would be called by the Plaintiff if this letter were introduced.

Mr. Nesbett: Now, your Honor, this is——

The Court: Now, you go ahead and cross-examine the witness and then we'll argue about it a little later on.

Q. Now, as to the photographs, Exhibit D—wasn't there anything—how do you know these came from Clark's report except that you asked that you get—that this attorney get the exhibits from Clark's report? There's nothing on them to indicate they came from his report, is there?

A. Except that, and I haven't read it today, but as I looked at Clark's report it seemed to me that where he referred to the scene, that he referred to photographs or as he said, exhibits, which bore the same numbers that those photographs bear. I could be in error on that point, but I checked it at the time because I was interested.

Q. The photos themselves had nothing attached to them and certainly they aren't marked to indicate they're part of the exhibits in his report?

A. There's nothing on the photographs to indicate they are [80] original at all.

Mr. Nesbett: I have no other questions, your Honor.

The Court: You may step down.

(Thereupon, the witness retired from the stand.)

Mr. Nesbett: I would like to be heard briefly, your Honor.

The Court: Well, just a minute, please. 1732 (b) says: "If any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence, or event, and in the regular course of business has caused any or all of the same to be recorded, copied, or reproduced * * * the original may be destroyed in the regular course of business * * * Such reproduction, when satisfactorily identified, is as admissible in evidence as the original * * *"

Well, now, let's go back and read that again. Now, I don't know—"if any department or agency of the government in the regular course of business has kept or recorded any memorandum," etc., "of any act, transaction, occurrence, or event, and in the regular course of business has caused the same to be recorded, copied," etc., "the original may be destroyed."

And if the original is destroyed, then the copies may be used. Now, where does it say these business records are admissible? Now, section 1733 talks about government records [81] and papers and says, "Books or records of account of minutes of proceedings," etc. And then it says, "Properly authenticated copies or transcripts of any books, records,

papers or documents of any department or agency of the United States shall be admitted in evidence equally with the originals thereof."

We have this sort of a situation here. We have an investigating agency of the Government, an investigating agency of the Government goes out and interviews people, takes statements and then makes a report. Now you want that report to be introduced into evidence without the parties who made the statement being in the court, without being subject to cross-examination. I don't think the rule goes that far. I just don't think it goes that far.

Mr. Talbot: I agree with your Honor that the proposition I advanced is enough to make a lawyer or judge—to make his hair stand on end, but I think that this is clearly what the Congress intended.

The Court: Well, now, what does the Court say? What do the cases say? I found out you can't rely upon the statute because the Courts sometimes interpret the statute entirely different.

Mr. Talbot: Well, now, this Third Circuit case, your Honor, is in a case which was involving civil liability for an explosion of a tank. The District Judge kept out the report and we are not going that far. We are not offering the CAB report [82] with its opinion and conclusion. We are not offering that.

The Court: But you are offering these two documents and one document says there was hauled on the day of the crash 16 cartons of dynamite and the other document says that the weight of the air-

craft was so much, and the useful load was 865.4 pounds. Why, how can the Plaintiff meet this document by any kind of evidence at all?

Mr. Talbot: Well——

The Court: We don't know who made the investigation, who made the weights, when they were made. I called your attention to the Ninth Circuit case that came down in the past year that went into quite an extensive discussion as to what was admissible under this section. That is under subsection (a). That has nothing to do with public documents but private documents.

Mr. Talbot: Well, your Honor, in this case the Third Circuit says the report—that is the Bureau of Mines report—which the Plaintiff offered had been prepared in obedience to the above statutory provisions, the ones that required the Bureau of Mines to make an investigation. Same thing here. Civil Aeronautics Board required by the statute to make an investigation, and in fact there's another provision in the Civil Aeronautics Act which makes it a misdemeanor for any person to refuse to answer any lawful inquiry of the Civil Aeronautics Board—a legal duty to make this information available.

The Court: Have you Shepardized the two decisions you [83] presented to me?

Mr. Talbot: No, sir. I have looked at the annotations to the statute and I find nothing later or to the contrary on this business of these—this type of exhibit, but I did run across a Ninth Circuit case.

The Court: In order to have the document admitted you certainly have got to lay a foundation and I don't think you lay a foundation by presenting the documents and say, "I got these from the person who got them from the Civil Aeronautics Board." I don't think that is a foundation. Of course it's true that on Exhibit C we have here a certification—says, "I have compared this and certify it to be a true copy. Bureau of Safety Investigation."

Mr. Talbot: Your Honor, maybe we can do this: I can withdraw F. That is really the bad one.

The Court: You don't have to withdraw it. It's only marked for identification. It's here. Let it stay in the record for identification.

Mr. Talbot: Well, I won't offer F. I think C, that C does have enough earmarks of authenticity to entitle it to be admitted.

The Court: Well, I don't agree. I don't agree with C. However, I want to read your two cases you have got here and——

Mr. Talbot: And on the statute, your Honor stopped [84] reading one sentence too soon.

The Court: I did?

Mr. Talbot: On 1732.

The Court: Now, you read it the way you think it ought to be read; maybe I didn't read it right.

Mr. Talbot: Well, the preceding sentence provides that the original may be destroyed. And your Honor thought that that meant that only where the original had been destroyed would a copy be received. Not so. The next sentence says, "Such re-

production, when satisfactorily identified, is as admissible in evidence as it is in any judicial proceeding * * * whether the original is in existence or not * * *"

The Court: Well, that's perfectly true. That if the original has been destroyed and then these copies are admissible, but that's not the problem here.

Mr. Talbot: But we don't care whether it's been destroyed or not as long as we have a copy. Now, the following section, 1733, has to do with the admissibility of Federal, Government records in a State court, and that is where certification is required.

The Court: What do you mean by State court? Where do you see State court?

Mr. Talbot: Well, 1732 starts out by saying, "In any court of the United States and in any court established by Act of Congress," which would include this court, and then it has [85] detailed provisions for how you get Government documents in evidence.

The Court: I know, but where does 1733 say anything about a State court? This is Federal rules. I assume it applies to Federal courts, not State courts.

Mr. Talbot: I think not, your Honor. The annotations that I read under 1733 were largely, as I recall, State court decisions.

The Court: You just cannot rely upon annotations. I remember when I was on the Superior Court that I rendered a decision decided upon a

syllabus and then after I got to looking in the case I had to come back and reverse myself because the syllabus didn't follow the ruling of the case. And so you just cannot depend upon annotations. Now, certainly there must have been some decisions upon this particular statute. You have given me two. I am going to read them and Shepardize them.

Mr. Nesbett: I'd be curious to ask counsel, your Honor, through the court, if in the Bureau of Mines case the report they submitted was not a report based upon observations or tests or field trips —examinations made by officials? In other words, observations that they had made in the regular course of business, such as is mentioned in the statute, if those weren't the facts in that case?

Mr. Talbot: The Court of Appeals said, "The report is no less admissible because it contains conclusions which are [86] based upon hearsay evidence as well as upon observations."

The Court: We don't have a report here; all we have is a document.

Mr. Talbot: That is true, your Honor, which is part of the official record kept in the course of business by CAB. Their business is investigation as well as——

The Court: Well, you haven't got any testimony to that effect. All you have is you telegraphed to a lawyer in Washington to get you these records and he wrote a—wired you and said he had them and sent them to you, but that's the only testimony we have.

Mr. Talbot: Well, I didn't have time to go to Washington and I didn't have——

The Court: Well, that may be perfectly true.

Mr. Nesbett: Your Honor, I'd like to pass to the Court to read in the time you read those two decisions, procedure of regulations of promulgation of part 3, 11, put out by the Civil Aeronautics Board regarding the testimony of Safety Agent such as Mr. Clark, who made this examination or investigation and report, and the limitations on his ability to testify before this court. Your Honor, he, Mr. Clark, himself, couldn't take the stand and testify as to a matter of opinion except subject to these limitations. This appears to me to be attempting to get at indirectly what Mr. Clark couldn't substantiate sufficiently to get in himself. [87]

The Court: Well, it's nearly 3:00 o'clock. I think we'll take a recess until 15 minutes after 3:00 o'clock.

(Whereupon, at 3:15 o'clock p.m. court reconvenes following a 15-minute recess, and the following proceedings were had.)

The Court: Sorry that I haven't had very much time to resolve this problem. I wish I could turn to that Ninth Circuit case that's come down. I may be able to find it after recess today, but I can't—but at the present time I am going to rule that the exhibits are inadmissible. However, I may change my mind before the end of the case and allow you to introduce them, but I don't think that there is—sufficient foundation has been laid on the exhibits.

However, I am not foreclosing the fact that I may change my mind. Now, can we call down the jury?

Mr. Talbot: Yes, your Honor.

The Court: Call down the jury.

(Whereupon, the bailiff recalls the jury and the jury returns to the courtroom.)

The Court: Is it stipulated that the jurors are present in the box?

Mr. Nesbett: Yes, your Honor.

The Court: I'd like to ask counsel a question. I notice that one of the jurors is attempting to keep notes. Is it permissible to keep notes in this court by the jury? I [88] usually never allow it in my court because I want them to pay attention to the evidence and not to notes they are trying to keep.

Mr. Nesbett: Your Honor, in 12 years I can't say that the question has ever come up to my knowledge. I don't know.

Mr. Talbot: I don't know either, your Honor.

The Court: Well, I am going to request the jury not to keep any notes or try to keep any notes as far as the testimony is concerned. You can rely upon your recollection. I don't want you to go into the jury room and compare notes and say, "I took this down," and so forth and so on.

All right, call your next witness.

Mr. Talbot: Call Mr. King.

CLARENCE E. KING, JR.

called as witness for and on behalf of the Defendants, and, being first duly sworn, testifies as follows on:

Direct Examination

By Mr. Talbot:

Q. Please state your full name, Mr. King?

A. Clarence E. King, Jr.

Q. Where do you live, Mr. King?

A. 1701 Aleutian Street, Anchorage.

Q. You work for Morrison-Knudsen Company?

A. I do.

Q. What is your present position with that [89] firm? A. District office manager.

Q. Did you work for Morrison-Knudsen in December, 1955? A. I did.

Q. What was your position with Morrison-Knudsen then?

A. I was assistant project manager of the White Alice project.

Q. Did that include the work which was done at Big Mountain? A. Yes.

Q. Are you familiar, Mr. King, with the procedures which were followed by Morrison-Knudsen Company in December of 1955 with regard to the accountability of a remote site such as Big Mountain for materials and supplies furnished to that site? A. Yes.

Q. Can you tell us whether or not supplies and materials designed for Big Mountain, once they commenced to move in that direction, would have been charged out to that site?

(Testimony of Clarence E. King, Jr.)

A. Yes; there's quite a change in the paper work tracing them from wherever they started until they got to the site.

Q. Now, this was done in the regular course of your business? A. Oh, yes.

Q. Now suppose, Mr. King, that a portion of merchandise or equipment charged out to the remote site at Big Mountain were destroyed by an accident such as an airplane crash—in the regular course of business would any report such as an Over, Short and Damaged Report have been made by the [90] officials at the remote site to the office in Anchorage?

A. It was required OS&D, Over, Short and Damaged Report be made.

Q. And were those Over, Short and Damaged Reports made and kept in the regular course of the business at Morrison-Knudsen? A. Yes.

Q. Now, I'll ask you if you have brought with you at my request and in response to a subpoena, a certain Over, Short, and Damaged Report dated December 18, 1955? A. Yes; I have.

Q. And do you have that document before you?

A. I do.

Q. Can you tell us who at the Morrison-Knudsen Company is the official custodian of that document?

A. I am now. I have all the files.

Q. Was the document that you have before you taken from your files? A. Yes.

Q. Was that document made and kept in the

(Testimony of Clarence E. King, Jr.)

regular course of business? A. Yes.

Q. Does that document refer to the loss of 16 cases of dynamite?

Mr. Nesbett: I will object to the contents of the [91] report. It hasn't been shown to counsel.

The Court: Well, he's not asking for the contents report, he's only asking him if it refers to something. He's trying to pinpoint the document.

Mr. Nesbett: It comes very close to referring to the contents of the document, your Honor, without having——

The Court: Overruled.

Mr. Talbot: Will you read the question back, please?

(Thereupon, the reporter read back question, Line 23, Page 91.)

A. It does.

Mr. Nesbett: May I have that document, please? (The document was handed to counsel.) May I ask the witness a question or two, your Honor?

The Court: Yes.

Mr. Nesbett: Mr. King, was this Over, Short, and Damaged Report submitted by the signatory, Mr. C. A. Wilson?

A. From the face of it, it was. I wouldn't know, personally?

Mr. Nesbett: You wouldn't know personally?

A. No; I wouldn't have received it from him.

Mr. Nesbett: Did you received it from him, or from whom did you receive it?

(Testimony of Clarence E. King, Jr.)

A. It was in the files of Contract 1787.

Mr. Nesbett: Then you know nothing about it except you found this in the files when you were asked to look, is that [92] correct?

A. That's correct.

Mr. Nesbett: To whom is this OS&D Report directed? I notice no direction at the top of the page.

A. Those reports were prepared and a number of copies which were distributed to a number of different departments. That particular copy, I don't know which department it was distributed to.

Mr. Nesbett: But did the original—where is the original? I notice this is a typewritten copy.

A. I wouldn't know of my personal knowledge. The original was supposed to be submitted to the Western Electric Company. Whether it was or not, I don't know.

Mr. Nesbett: Then this OS&D Report in the ordinary course of business would have been directed to Western Electric, is that correct?

A. In the ordinary course of business we would write Western Electric a letter saying "so and so has happened and here's an Over, Short, and Damaged Report saying what happened."

Mr. Nesbett: And was Mr. Wilson, to your knowledge, an employee of Morrison-Knudsen Company?

A. Yes; he was the site clerk at Big Mountain at this time.

Mr. Nesbett: In December of 1955?

(Testimony of Clarence E. King, Jr.)

A. Yes.

Mr. Nesbett: Do you know where he is [93] now?

A. He's at Driftwood Bay.

Mr. Nesbett: And where is that, sir?

A. It's near Dutch Harbor.

Mr. Nesbett: Is he still working for Morrison-Knudsen Company?

A. He is working for a joint venture in which we are participants.

Mr. Nesbett: How long have you been with Morrison-Knudsen?

A. Since 1951.

Mr. Nesbett: And where were you employed in 1955, Mr. King?

A. In Anchorage.

Mr. Nesbett: Do you offer this?

Mr. Talbot: Yes, your Honor, I offer it as Defendants Exhibit G.

Mr. Nesbett: I object, of course, your Honor, to the admission of the hearsay, explanatory remarks made at the bottom of the page. I have no objection to the admission of the top portion of the OS&D Report. If your Honor will look at the report, I think your Honor will see what I mean.

The Court: I'd like to ask the witness a question or two. Would you testify that this memorandum was made in the regular course of business?

A. Yes. [94]

The Court: And that the memorandum was made

(Testimony of Clarence E. King, Jr.)

at the time of the transaction or occurrence or within a reasonable time thereafter?

A. Well, I believe it's dated substantially the same date as the accident. I have no personal knowledge of when it was made.

The Court: Well, as far as you know it was made on the date of the accident or immediately thereafter?

A. I have no reason to believe otherwise.

The Court: Objection overruled. It may be received in evidence.

Mr. Talbot: I have no further questions of this witness, your Honor.

The Court: What is that, G?

Deputy Clerk: G.

The Court: Any cross-examination?

Mr. Talbot: Oh, I beg your pardon, your Honor —I do have——

Q. (By Mr. Talbot): Mr. King, have you also at my request brought with you certain flight reports furnished Morrison-Knudsen Company by Cordova Airlines? A. Yes.

Q. Are those flight reports having to do with a certain airplane known as Cessna 1569 [95] "Charley"? A. Yes.

Q. And they are dated in November and December of 1955? A. Yes.

Q. Now, are you familiar with the procedures followed by Morrison-Knudsen Company when they have occasion to charter an aircraft?

A. Yes.

(Testimony of Clarence E. King, Jr.)

Q. In the regular course of the business of chartering an aircraft, can you tell us whether or not daily flight reports or manifests are received from the airline?

A. Yes; it's required that each flight be supported by a manifest or flight report, some written document.

Q. Are you the official custodian of these flight reports? A. Yes.

Q. Were they made and kept in the usual course of business by Morrison-Knudsen?

A. They were kept by Morrison-Knudsen; I believe they are actually made by Cordova Airlines.

Mr. Talbot: May I see the documents, please? (The documents were handed to counsel, who showed them to opposing counsel.)

Mr. Nesbett: Who made these flight reports, Mr. King?

A. I have no knowledge.

Mr. Nesbett: Did you make them up in your office?

A. I have no knowledge. [96]

Mr. Nesbett: Are these copies of other flight reports that are in your office?

A. They are not copies of other flight reports, no. They are the file copies which are in the files. The source of them is unknown to me.

Mr. Nesbett: But were your duties—did your duties require you to be concerned with flight reports such as these in December of 1955?

A. Not my personal duties, no; the duties of some of my employees.

(Testimony of Clarence E. King, Jr.)

Mr. Nesbett: Then you, yourself, had nothing to do with flight reports that might have been submitted by Cordova, is that correct?

A. No; I would never see one.

Mr. Nesbett: Well, you don't know whether these were submitted by Cordova Airlines itself or were made from copies supposedly coming from Cordova, do you?

A. That's correct.

Mr. Nesbett: You don't know that?

A. I don't know.

The Court: All you know is you found those in the files?

A. That is correct.

Mr. Nesbett: And had you ever had occasion then to examine Cordova Airline flight reports prior to being subpoenaed [97] by Mr. Talbot to do so?

A. No.

Mr. Nesbett: Did you in your search look for other flight reports of Cordova Airlines?

A. No. These were the particular ones that the gentlemen were interested in.

Mr. Nesbett: That's all, your Honor. I will object to their admission.

The Court: They haven't been offered yet.

Mr. Talbot: I offer them as Defendants Exhibit H.

The Court: May I see the documents?

Mr. Talbot: Yes, your Honor; 4 flight reports

(The documents were handed to the Court.)

(Testimony of Clarence E. King, Jr.)

The Court: May I have a stipulation now of the parties before I rule? Can it be stipulated that the pilot was H. Haley?

Mr. Nesbett: That's right. Yes, sir, we so stipulate.

Mr. Talbot: Yes, your Honor, we so stipulate.

The Court: And the date of this accident was when?

Mr. Nesbett: December 18, 1955, your Honor.

The Court: December?

Mr. Talbot: Yes, your Honor.

The Court: Well, now, these flight reports are dated November. The last one is December 5.

Mr. Talbot: Yes, your Honor. May I——

The Court: Why is it material? [98]

Mr. Talbot: Dispute between the parties as to how much cargo was carried on the flight in question. We think that these flight reports may be relevant to show, as we contend that Pilot Haley frequently overloaded his plane and that therefore it's not entirely beyond the realm of possibility that he overloaded it on the flight in question.

The Court: Objection sustained. We cannot try a case upon possibility or conjecture. The fact that they may have overloaded the day before the accident doesn't mean that it was overloaded on the day of the accident.

Mr. Talbot: Very well, your Honor.

The Court: They may be marked for identification only.

Mr. Talbot: Thank you, your Honor. I have no further questions of Mr. King.

Mr. Nesbett: I have no cross-examination.

The Court: Step down. May this witness be excused?

Mr. Talbot: Yes, your Honor.

The Court: Mr. Nesbett?

Mr. Nesbett: Yes, your Honor. I'm sorry.

The Court: You may be excused.

(Thereupon, the witness retired from the stand.)

The Court: Call your next witness.

Mr. Talbot: Call Mr. Lindemuth.

ALBERT N. LINDEMUTH

called as a witness for and on behalf of the Defendants, and, [99] being first duly sworn, testifies as follows on:

Direct Examination

Mr. Talbot: I'm sorry, your Honor—before Mr. Lindemuth assumes the stand I'd like to call Mr. Smith for one question.

The Court: All right. Mr. Smith, will you come forward?

MERLE K. SMITH

resumes the witness stand and testifies as follows on:

Cross-Examination

Mr. Talbot: I should like to call upon Mr. Nesbett to produce for me at this time the original Form 337 for the aircraft in question, dated December 4, 19—pardon me—November 4, 1955.

Mr. Nesbett: I hand to Mr. Talbot Form 337,

(Testimony of Merle K. Smith.)

your Honor. It is not the original but it is a carbon copy which was retained by Cordova Airlines in the usual course of business.

Mr. Talbot: And I hand the document to the witness, if I may.

By Mr. Talbot:

Q. Mr. Smith, I will ask you to examine this document and tell me if it is a record made and kept by Cordova Airlines having to do with the maintenance of Cessna 1569 "Charley"?

A. It is.

Q. The document refers, does it not, to the occasion of November 4, 1955, when Federal wheel-skis were installed on this [100] airplane?

A. It does.

Q. Please refer to this document and tell us what the empty weight of Cessna 1569 "Charley" was after the skis had been installed?

A. If I'm looking at this right it says 1,612 pounds.

Q. Where does it say that, Mr. Smith?

A. Well, on the bottom it has three—it has wheels, skis and floats and each one of them is listed in empty weight.

Q. Now refer to the column——

The Court: Do you have any knowledge except what's in that document?

A. Not much. I mean I'm familiar with these forms but actually I don't know too much about it.

The Court: Well, I think the document is the

(Testimony of Merle K. Smith.)

best evidence, rather than letting the witness read the document.

Mr. Talbot: Very well, your Honor. We do not vouch for the entire document. However——

The Court: Well, I'm sorry; if the document goes in at all it has to go in in its entirety. You can't pick out just what you want and disregard the rest. Now this witness doesn't know anything about what's in the document except what the document says itself. Now, I don't think the witness should be allowed to read from the document unless the document is in evidence. [101]

Mr. Talbot: Very well, your Honor.

Mr. Nesbett: I will stipulate that it can go in evidence, your Honor.

Mr. Talbot: I will so stipulate, your Honor.

The Court: It may be received as Defendant's Exhibit I.

Mr. Talbot: I have no further questions of Mr. Smith.

The Court: Any questions?

MERLE K. SMITH

testifies as follows on

Redirect Examination

By Mr. Nesbett:

Q. What is that form called, Mr. Smith?

A. Form 337.

Q. And is that a form required to be kept by

(Testimony of Merle K. Smith.)

Cordova Airlines or any airline, by the Civil Aeronautics Authority?

A. It is. You keep the original in the airplane and a copy in your files.

Q. Was that form prepared on the plane in question in this lawsuit just prior to its traveling to Iliamna to work on this charter business?

A. Yes, it was.

Q. To whom is that report submitted and why?

A. That's submitted to the CAA.

Q. And what is the purpose of the report?

A. So that they may inspect the form and know what work, repairs [102] or alterations or what not is being done on the airplane.

Q. Now, with respect to this Cessna 180, you had a particular reason for submitting the Form 337 on it as of the date of submission of that form, didn't you? A. Yes.

Q. And what was that reason?

A. That was the installation of the ski-wheel combination.

Q. And was that the reason you submitted that particular Form 337? A. Yes.

Q. You didn't do the work yourself—it was done by one of your mechanics, wasn't it?

A. It was done in the shop. I was around there seeing it being done.

Q. And it's signed by your chief mechanic at Cordova, isn't that right? A. That's right.

Mr. Nesbett: That's all.

Mr. Talbot: No further questions.

The Court: You may step down.

A. Thank you.

(Thereupon, the witness retired from the stand.)

Mr. Talbot: Call Mr. Lindemuth.

ALBERT N. LINDEMUTH

resumes the witness stand, and having previously been sworn, [103] testifies as follows on

Direct Examination

By Mr. Talbot:

Q. Please state your full name, Mr. Lindemuth.

A. Albert N. Lindemuth.

Q. And your occupation? A. Pilot.

Q. And where do you live?

A. 2316 East Fifth Avenue.

Q. How long have you been a pilot?

A. Since 1939.

Mr. Nesbett: Your Honor—excuse me, maybe I'm way off base, but was Mr. Lindemuth sworn?

Deputy Clerk: Yes.

The Court: Yes, he was sworn before Mr. Smith took the stand.

Q. (By Mr. Talbot): You live where, sir?

A. 2316 East Fifth.

Q. When did you first become a pilot?

A. 1939.

Q. About how many hours' flight do you have as a pilot?

A. Between 12 and 13,000 hours.

(Testimony of Albert N. Lindemuth.)

Q. What is your present business, Mr. Lindemuth?

A. I'm in the aircraft charter and contract business. [104]

Q. In connection with your business, do you have occasion to repair aircraft? A. Yes, sir.

Q. Have you ever had occasion to install or supervise the installation of whee-skis on an aircraft? A. Yes, sir.

Q. Can you estimate for us about how many times? A. 4.

Q. About 4? A. Yes, sir.

Q. Have you ever owned a Cessna 180?

A. Yes, sir.

Q. Have you ever flown a Cessna 180 as pilot?

A. Yes, sir.

Q. About how many hours?

A. Approximately 300.

Q. Now, for about how many years has the repair and maintenance of aircraft been part of your business?

A. I used that wholly as a business for approximately 3 years and have been connected with it, of course, in association with the other aircraft business since 1939.

Q. Have you ever had occasion upon completion of a repair or alteration to an aircraft to compute or figure the legal weight or useful load?

A. Yes. [105]

Q. About how many times have you made such computations?

(Testimony of Albert N. Lindemuth.)

A. I do that approximately every time you work on an airplane.

Q. Well——

A. I couldn't even guess, other than say—I'd say a hundred times. I know I have worked useful load problem many times.

Mr. Talbot: I would ask Mr. Nesbett to produce for us the CAA Manual for this aircraft. (The document was handed to counsel.) I would ask that Mr. Nesbett stipulate with me that the document which he has handed me is the CAA Approved Manual for Cessna 1569 "Charley" and that it may be received in evidence.

Mr. Nesbett: I will so stipulate, your Honor.

Mr. Talbot: I offer it, then, as Defendant's Exhibit J.

The Court: It may be received in evidence.

Deputy Clerk: These are excerpts from the Manual?

Mr. Talbot: I believe that's the entire Manual.

Deputy Clerk: I thought they were excerpts.

Q. (By Mr. Talbot): Mr. Lindemuth, I hand you Defendant's Exhibit J, the Manual, and ask you to examine that. (Short pause.) I would also like to hand the witness Exhibit I. I hand you Defendant's Exhibit I, Mr. Lindemuth. Now, Mr. Lindemuth, Defendant's Exhibit I, which is this Form 337, states on the back near the top, "Sky Model AWB 2500 A," and then is given a serial number. Do you see that, sir? [106]

A. Yes, sir.

(Testimony of Albert N. Lindemuth.)

Q. And above that it says that these were Federal wheel-skis. Do you see that? A. Yes, sir.

Q. Are you familiar with any CAA approved specifications with regard to this particular type or model of Federal wheel-skis? A. Yes, sir.

Q. Do the specifications for these wheel-skis have anything to say about the maximum of allowable gross weight of an aircraft upon which they are installed? A. Yes, sir.

Q. Can you tell us what the maximum allowable gross weight is on this model of Federal ski-wheel?

A. Would you like to have me explain that to the Court or do you just want me to answer the question?

Q. Be pleased to have you explain it.

A. On this particular installation the gross weight is 2550 pounds.

The Court: What do you mean, 2550 pounds?

A. Sir, the aircraft manufacturer approved this Federal ski-wheel combination as part of the manufacturing of the airplane. If I were to put that on an airplane myself, or anyone were to put it on, outside of the manufacturer, it would be 1250 pounds or gross weight of 2500 on this. On this particular manufacture, it's 2550 pounds. I [107] found that out this morning. I checked myself, back——

Q. Now, Mr. Lindemuth, referring again to Defendant's Exhibit "I" which you have before you, can you tell us what that shows on the back with

(Testimony of Albert N. Lindemuth.)

regard to the empty weight of this aircraft before the skis were installed?

A. It says 1541 pounds.

Q. And what does it show with respect to the empty weight of the aircraft after the wheel-skis were installed? A. 1612.

Q. Isn't there a figure up there, 1671.6?

A. Uh huh, yes.

Q. Can you explain for us if you can, the difference between 1671.6 in one place and 1612 in the other?

A. I could probably explain it. The actual weight of this installation as listed in the Cessna specifications is 108 pounds.

Q. And that includes what?

A. That includes the skis, the hydraulic cylinders that operate the skis, and the pump itself, the hydraulic pump and the necessary rigging to attach these skis according to a Cessna drawing.

The Court: You mean to say that 108 pounds would be added to 2550?

A. No, sir, that doesn't change your gross weight. That comes out of that 2550. [108]

The Court: You take it out instead of add it in?

A. That 2550 is something you can't exceed.

The Court: Now, listen, the jury is the one that is going to decide this, not me. I am just trying to find out what your testimony is.

A. My testimony is that that gross weight is

(Testimony of Albert N. Lindemuth.)

2550 pounds and the weight of this ski-wheel installation is 108 pounds.

The Court: So that would bring the gross weight down?

A. No, it doesn't affect the gross weight. The only thing it affects is the bottom figure down there, the useful load.

The Court: You take 108 out of the useful load?

A. Yes, sir, that's the only place there is for that to come.

The Court: Is this 108 pounds in addition to the wheels? This is ski-wheels, now. You mean to say you take off the wheels and then put on ski-wheels?

A. You use the same wheels, normally.

The Court: Well, you mean it adds 108 pounds when you put on the skis, is that right?

A. Yes, sir.

Q. (By Mr. Talbot): Tell us, Mr. Lindemuth, how this Federal ski-wheel arrangement works and what the purpose of it is?

A. Well, the purpose of it is to give the utility, airplane being able to land on the snow or ice surface and—as well as the runway, a dry runway—and it works on the [109] principle of the hydraulic pump working on the cylinders that are attached to the skis, will pump the skis either up or down as you desire, according to the runway you desire to land on.

Q. Now, Mr. Lindemuth, I wonder if you could come down to the blackboard here and bring those

(Testimony of Albert N. Lindemuth.)

exhibits with you? (The witness so complied.) I believe your testimony is that with this installation the maximum gross load, gross weight possible for this aircraft is 2550 pounds? A. Yes, sir.

Q. Now, the empty weight after the skis were installed was what, according to this Form 337?

A. Is this necessary? (Indicating figures on blackboard.)

Q. No, you can erase that and we'll start over. You can erase the top part, too, Mr. Lindemuth, and just use the whole blackboard.

A. 1649 would be the empty weight of the aircraft. (Indicating figures on blackboard.)

The Court: Well, you said 1541 prior when the skis were put in, when you said after the skis it was 1612? A. That is the empty weight, sir.

The Court: What is the 1541 you put up there?

A. That was the original empty weight before they added this 108 pounds of ski-wheels.

The Court: Then the empty weight is 1649?

A. 1649. [110]

Q. (By Mr. Talbot): Now, Mr. Lindemuth, I notice at the top of Exhibit G, on the back it states as follows: "Skis were skinned with 26-gauge galvanized iron for a weight increase of 13 pounds per ski." Do you see that? A. Yes, sir.

Q. Now, can you tell us whether or not this 13 pounds per ski of iron which was added would be in addition to the 108 pound figure you have given?

(Testimony of Albert N. Lindemuth.)

A. Yes, it would be in addition to the 108 pounds.

Q. And how many pounds more would it make?

A. 26 pounds.

Q. Would you add that to the empty weight, then? (Short pause.) You place the figure of 1675 pounds on the blackboard. Now, is it your testimony that interpreting this form, that that would be the empty weight of the airplane with the wheels as installed? I mean the skis as installed?

A. According to these figures that would be it.

Q. Now, what would be the maximum allowable useful load for this aircraft?

A. 825 pounds.

The Court: Better subtract that again. (The witness so complied.) Still doesn't add up. We don't want to drop a box of dynamite here now, we want to get it all in. [111]

A. You say I was wrong? I still say it's 14, take away 6, is 8, isn't it?

Q. (By Mr. Talbot): Start over, Al. (The witness so complied.) That's better.

A. 875 pounds.

Q. Now, Mr. Lindemuth—oh, I wish you would have left those figures up there. Would you put them back? (Short pause.) Very well. Now, Mr. Lindemuth, in computing the useful load that a plane's actually carrying when it's in service, what items are taken into consideration?

A. Well, the useful load is the difference between the empty weight and the allowable gross

(Testimony of Albert N. Lindemuth.)

weight, and everything that goes into the airplane is included in that.

Q. Now, does your empty weight include gasoline? A. Negative.

Q. Does it include oil? A. Negative.

Q. Does it include the pilot? A. Negative.

Q. Does it include any cargo which may be carried? A. No.

Q. Now, can you tell us how much oil would be normal for a Cessna 180 to carry?

A. It would be normal that he would be carrying 10 quarts of oil. The plane will hold 12, but the normal operation is [112] to put 10 in.

Q. Can you tell us how much 10 quarts of oil would weigh?

A. 10 quarts would be 2½ gallons; approximately 20 pounds, 19 pounds.

Q. Would you write 19 pounds on the board, please, a separate column? (Short pause.) Now, is there any custom or practice or regulation with regard to the weight of the pilot? Do you weigh each pilot separately before each flight, or is there some standard figure that is taken?

A. 170 pounds is the standard figure.

Q. Would you put that down, please? (Short pause.) Now, how much gasoline does a Cessna 180 that has not had its tanks modified hold?

A. 55 gallons; it holds 60 gallons but there's 5 gallons unusable that is included in the empty weight of the aircraft.

(Testimony of Albert N. Lindemuth.)

Q. The 5 gallons is included in the empty weight?

A. The unusable gasoline is included in the empty weight.

Q. Very well. Then there would be 55 gallons of usable gasoline? A. Yes.

The Court: If it was full?

A. If it were full, 55 gallons.

Mr. Talbot: I ask Mr. Nesbett to produce for me the log for this aircraft for December 17, 1955. (The document was handed to counsel.) I'd ask Mr. Nesbett to stipulate with [113] me that this document is the copy of the pilot's log for December 17, 1955, and that it may be received in evidence as Defendant's Exhibit K.

Mr. Nesbett: I will stipulate that that is the pilot's log for December 17, but I don't think I should stipulate that it should go into evidence. I don't know how he would connect that up as being indicative of the weight or the operation of the airplane on the following day, and——

The Court: Well, I think maybe this is a question for the jury to consider. Of course the plane was being operated—it might show how much gasoline was in the day before, and some computation may be made as to the amount of the gasoline he had at the time of the crash. Objection overruled; it may be received in evidence.

Deputy Clerk: This is Defendant's K?

Mr. Talbot: Yes, ma'm.

Q. (By Mr. Talbot): Mr. Lindemuth, I hand

(Testimony of Albert N. Lindemuth.)

you Defendant's Exhibit K and ask you if you can tell from that log for December 17, how much gasoline the pilot says he had on board when he started out that day? A. It says 55 gallons.

Q. And is there any entry there of gasoline added by the pilot at the end of the day on the 17th?

A. It says 35 gallons. [114]

Q. Can you tell from examining that log how many hours this plane flew on December 17, 1955?

A. 2 hours and 5 minutes—no, wait a minute—we got some up here at the top—2 hours and 50 minutes.

The Court: Well, would you take it then that in 2 hours and 50 minutes he used up 35 gallons of gas? A. Yes, sir.

Q. His consumption of gasoline then would have been approximately 12 gallons per hour, would it not? A. Yes.

Q. Now, let's assume, Mr. Lindemuth, that on the 18th the pilot started out with full tanks or 60 gallons and that he flew for an hour and a half before he crashed. How many gallons of gasoline would he have had on board when he crashed?

A. 37.

Q. If you assume—strike that. I believe you are absolutely right, Mr. Lindemuth, 37 gallons. And Mr. Nesbett and I have stipulated, Mr. Lindemuth, that this gasoline, whatever it was on board, weighed 6 pounds per gallon. So would you make that computation as to how much gas weighed?

A. 222.

(Testimony of Albert N. Lindemuth.)

Q. Now, Mr. Lindemuth, we'll make a further assumption and that is that the aircraft had on board 16 cases of dynamite and that each case weighed 53 pounds. [115] A. 848.

Q. That would give you a figure of 848 pounds for the dynamite? A. Yes.

Q. Then would you add the total of the 4 items that you have: the oil, the pilot, the gas and the dynamite? A. 1259.

Q. And assuming that your figures are correct for the gas and the dynamite, how much if any was the plane overloaded?

A. As far as those figures (indicating), 384 pounds.

Q. Very well. You may resume the stand, Mr. Lindemuth. And you better take those exhibits with you. Mr. Nesbett may want to cross examine you with respect to them. (The witness so complied.)

Mr. Talbot: You may examine, sir.

ALBERT N. LINDEMUTH

testifies as follows on

Cross-Examination

By Mr. Nesbett:

Q. Mr. Lindemuth, what was the basis for your statement in saying that the weight of the pilot is calculated regularly and routinely at 170 pounds?

A. That's the standard figuration of average human weight, I believe, Mr. Nesbett.

Q. Then in your calculations you have simply

(Testimony of Albert N. Lindemuth.)

called his weight as 170 pounds because the CAA does that routinely in setting [116] specifications, isn't that right? A. Yes, that is correct.

Q. Did you know Herbert Haley, a pilot in this area in 1955? A. Yes, I know Mr. Haley.

Q. He didn't weigh 170 pounds, did he?

A. No, sir, not to my recollection he didn't.

Q. Now, Mr. Lindemuth, your figures there on the board, the bottom set of figures indicate, based on an assumption that Mr. Talbot asked you to make, that there could have been an overload of 384 pounds if 16 cases of dynamite had been carried, plus the pilot's weight, the gasoline and the oil, is that correct? A. Yes.

Q. Did the form you were looking at indicate anything in connection with equipment that had been removed from the airplane for the flight?

A. The form did not indicate anything that may have been removed from the airplane.

Q. Now, Mr. Lindemuth, would you step down to the blackboard again, please? (The witness so complied.) I believe you testified that you are familiar with Cessna 180s, didn't you? A. Yes.

Q. And in your experience is it possible to remove any of the seats from that airplane and still fly it? [117]

A. You can remove 3 of the seats.

Q. You can remove both the back seats and one of the front seats?

A. As long as you leave the pilot seat there, that's all that is necessary for the flight.

(Testimony of Albert N. Lindemuth.)

Q. And it's possible to remove the dual controls from the airplane, too, isn't it? A. Yes, sir.

Q. So there's only one set of controls instead of two, and the one seat being for the use of the pilot, of course? A. That is correct.

Q. Do you know from your experience what the reduction in weight of that airplane would have been if the two rear seats and the one front seat had been removed as well as the dual controls?

A. I'll have to make a guess, and that would be 50 pounds I believe would be reasonable.

Q. 50 pounds. Now, Mr. Lindemuth, would you take the 50 pounds that would have resulted from making that change on the plane, what could have been the overload based on Mr. Talbot's assumption? A. 334.

Q. Based entirely on Mr. Talbot's assumption, there was—there were 22—did you say 22 gallons of gasoline aboard? A. 222 pounds. [118]

Q. 222 pounds aboard, and the 16 cases of dynamite—the overload then would have been 334 pounds, is that right? A. Yes.

Q. Now, suppose the pilot weighed 150 pounds instead of 170 pounds—that would be, in figuring the actual weight in the airplane and on this assumption, a reduction of another 20 pounds, isn't it? A. Yes, sir.

Q. And would you apply that reduction? (The witness so complied.) Now, based entirely on the assumption again, that would have left an overload of approximately 314 pounds? A. Yes.

(Testimony of Albert N. Lindemuth.)

Q. Now, Mr. Lindemuth, you have been flying around Alaska for a good many years, haven't you?

A. Yes.

Q. And a good many hours in Cessna 180s, haven't you? A. Approximately 300.

Q. And you have flown a lot of time over—around Lake Iliamna and Bristol Bay area, haven't you? A. Yes, I have.

Q. Now, do you know where Big Mountain is?

A. Yes, sir, I have been at Big Mountain.

Q. Do you know where the Iliamna Bay strip is?

A. I don't know exactly where that is.

Q. Do you know that it's located approximately opposite Iliamna [119] Bay on the Cook Inlet side but inland a short distance, don't you? You know approximately where it is, don't you?

A. I know where it is, but I just don't know which one of those strips down there is called Iliamna Bay strip. I have been all over.

Q. If you, as a pilot, were ferrying back and forth between Big Mountain and Iliamna Bay strip, do you know approximately the distance between those two points? A. Yes.

Q. What is it, sir?

A. I would say not to exceed 30 miles.

Q. And if you were hauling loads on charter flights, it certainly wouldn't be a requirement or prudent requirement, necessarily, to carry full tanks at all times, would it?

A. No, sir, it wouldn't.

(Testimony of Albert N. Lindemuth.)

Q. As a matter of fact, you bush pilots cut down your gas load whenever you can if you're hauling to the limit in order to give you extra payload, as you call it, don't you? A. Correct.

Q. Now, how much gas would a Cessna 180 burn in traveling the 30 miles between Iliamna Bay and Big Mountain?

Mr. Talbot: Object, your Honor. It isn't shown whether the plane is empty or light.

The Court: Overruled. You didn't show that yourself on your own computation. [120]

A. The gasoline consumption would be, I should judge, 5 gallons in that 30 miles.

Q. 5 gallons in 30 miles. Then would it be possible approximately to make a round trip between the two points on about 10 gallons of gasoline? A. Well, yes.

Q. That wouldn't leave you any leeway, would it though, if you were going to make the round trip?

A. No.

Q. And you would ordinarily carry a leeway of gasoline, wouldn't you?

A. In a case like that, why you would probably carry half again as much as you need, at least.

Q. Yes. And so if you were cutting down to get the maximum load, as the bush pilot would express it, you would at least have to carry about 15 gallons, wouldn't you, to make that round trip?

A. Yes.

Q. Now, what would 15 gallons at 6 pounds per gallon weigh—90 pounds? A. 90 pounds.

(Testimony of Albert N. Lindemuth.)

Q. Now, can you apply a correction to your figures to show what that airplane would have weighed with all that dynamite aboard, assuming that it's aboard, if the Pilot Haley had had only 15 gallons on board when he started out that [121] morning? Now, that will mean taking your 55 gallon computation times 6 and changing it to 90 and applying it to those figures in whatever manner is clear to you.

Mr. Talbot: Your Honor, I object to that as contrary to the evidence which is that the pilot put at least 35 gallons in the tank the night before.

The Court: Well, I don't know. Now this witness is an expert. He's being called upon to testify to something he doesn't know anything about except from his own experience, and he testified that the gas would weigh 222 pounds. Now, I think it's proper to ask him what it would weigh if you want to use lesser amount of gas.

Mr. Talbot: Very well.

The Court: I don't know what the evidence is going to be. Maybe they're going to show he only had 15 gallons in the plane.

A. If my figures are correct, it's 1,007.

Q. 1,007?

A. I used 19 pounds for oil, 150 for the pilot, 90 for the gas, 848 for the dynamite.

Q. That would be 1,007 inside the airplane. Now, I suppose you could subtract 1,007 from 1,259—is that how you would arrive at—in order to apply

(Testimony of Albert N. Lindemuth.)

the correction in gasoline or the hypothesis I am making, to the 314 pounds overload? [122]

A. We can do that another way. We used 37 gallons in Mr. Talbot's computations and we arrived at 222 pounds, so we are now using 15 gallons in your computation, or 90 pounds.

Q. You subtract 90 from 222?

A. And we get 132 pounds.

Q. And you would subtract 132 from 314, wouldn't you? A. 182.

Q. That would be 182 pounds, Mr. Lindemuth?

A. Yes.

Mr. Nesbett: I believe that is all, thank you.

ALBERT N. LINDEMUTH

testifies as follows on

Redirect Examination

By Mr. Talbot:

Q. Mr. Lindemuth, while you are still there, I believe in response to one of Mr. Nesbett's questions about items possibly having been removed from this plane, namely, the dual controls, the front seat, one of the front seats and the back seats —are those the items that Mr. Nesbett mentioned to you? A. Yes.

Q. And you made, as you said, a guess that that would reduce the empty weight of the aircraft by about 50 pounds? A. Yes, sir. [123]

Q. Now suppose, Mr. Lindemuth, that the front seat next to the pilot was taken out, all right, but

(Testimony of Albert N. Lindemuth.)

that it was replaced by a Fairbanks Aircraft Hammock Seat, Kit Model AS-1. Would that change your estimate of the amount of weight which was saved by these alterations?

A. It would be very doubtful, Mr. Talbot, if that seat and that installation was in the aircraft. All that seat consists of is two rods like this, with a bracket and when you carry freight you take them out and put them——

Q. And you think it's possible that they were not in the aircraft?

A. They probably weren't in.

Q. Are those back seat—is that a replacement for the back seat or front? A. Back.

Q. Suppose it was in the aircraft, though, about how much would it weigh?

A. Probably 10 pounds.

Mr. Talbot: I have no further questions.

ALBERT N. LINDEMUTH

testifies as follows on

Recross-Examination

By Mr. Nesbett:

Q. Were you in the Iliamna area in December of 1955, Mr. Lindemuth? [124] A. No, sir.

Q. Did you have occasion to visit the scene of the crash of the 180 in that area? A. No, sir.

Q. You have flown a Cessna 180 commercially, haven't you? A. Yes.

(Testimony of Albert N. Lindemuth.)

Q. Have you ever flown one with 182 pounds overload, to your recollection?

A. Fifth Amendment.

Q. Have you ever flown one with a 300 pound overload? A. Same answer.

Mr. Nesbett: No further questions.

The Court: May this witness be excused?

Mr. Talbot: Yes, your Honor.

(Thereupon, the witness retired from the stand.)

The Court: May I inquire of counsel how many more witnesses do you have?

Mr. Talbot: Excuse me, your Honor, just one moment. (Short pause.) One, maybe two, your Honor.

The Court: Well, we are going to have to have a discussion on some instructions.

Mr. Talbot: Yes, sir.

The Court: So ordinarily we discuss the instructions prior to the argument to the jury, so I don't suppose that you can complete your testimony by tomorrow noon, can you?

Mr. Nesbett: I have no idea who his witnesses are, [125] your Honor. My case depends largely on what proof I have to refute.

The Court: Well, we'll try to have some discussion as to the instructions either tomorrow morning or during the noon hour so this case can be argued to the jury in the afternoon.

Ladies and gentlemen of the jury, we are about

(Testimony of Albert N. Lindemuth.)

to take another recess. Again it is my duty to admonish you you are not to discuss this case with anyone; you are not to allow anyone to discuss it with you. You are not to discuss the rights of the principal or parties until the rights of the parties are finally submitted to you for your decision. Now, this means when you go home tonight you are not to discuss this case with your family or you are not to discuss it with your neighbors, and above all, you are not to seek out some bush pilot and talk to him about how this plane should be run. You are to keep an open and free mind until this case has been submitted to you, and after you get through with this case you can discuss the case all you want to. You can criticize the Court, the attorneys or witnesses—I don't care. But until this case has been finally submitted to you for your decision you must not discuss it with anyone. And you must not, under any circumstances, express or formulate any opinion as to whether the Plaintiff should or should not recover. With that admonition, we will now recess until 10 o'clock tomorrow morning. [126]

(Thereupon, at 4:30 o'clock p.m., June 2, 1958, this case was continued to the next morning at 10:00 o'clock a.m., June 3, 1958.) [127]

The Court: Is it stipulated the jury is present in the box?

Mr. Nesbett: Yes, your Honor.

Mr. Talbot: Yes, your Honor.

The Court: You may proceed.

Mr. Talbot: Your Honor, a preliminary matter: last evening the defense subpoenaed a witness named John Poppas. We later determined, however, that Mr. Poppas had no personal knowledge of matters in this case and Mr. Nesbett has stipulated with me that Mr. Poppas may be excused although he was subpoenaed if that is agreeable with the Court.

The Court: Well, Mr. Poppas is the one that signed that letter and you may have to have him here for foundation if you want to get the letter in.

Mr. Talbot: We are not going to offer the letter, either, your Honor.

The Court: Oh, aren't you? All right, he may be excused.

Mr. Talbot: Thank you. That is Defendant's Exhibit C for identification; we would like that to be considered as withdrawn.

The Court: It may be withdrawn.

Mr. Talbot: Your Honor, I noticed last evening two mistakes, [129] typographical errors in documents that we have submitted to your Honor, and I'd like to call the Court's attention to them. On page 2 of our proposed jury instructions there is a citation to 14 CFR 59.0. That is an error.

Mr. Nesbett: 59—?

Mr. Talbot: 59.0.

The Court: Which page is that?

Mr. Talbot: Page 2 of our proposed jury instructions, the bottom citations.

The Court: You know up here you don't use numbered pages—I mean numbered lines, and it's

very difficult to find them, sometimes. All right. What else is there?

Mr. Talbot: That should be 49.0 instead of 59.0.

The Court: All right.

Mr. Talbot: The other inaccuracy is in our trial memorandum in quoting from the Bruce case. The last word in the quotation is "court" and it should have been "tort," t-o-r-t, and the quotation doesn't make much sense the way we had it written, your Honor.

The Court: Well, I noticed that and I just presumed it was a secretarial error.

Mr. Talbot: Your Honor, I would like the court at this time to take judicial notice of certain Federal regulations which I referred to in our trial memorandum and the jury instructions. I thought perhaps for the record that I [130] could read a list of those and ask your Honor to take judicial notice of them.

The Court: I don't think there's any question, is there, Mr. Nesbett?

Mr. Nesbett: No, I don't believe so.

The Court: All right, you read them; I'll take judicial notice.

Mr. Talbot: Following regulations, 14 Code of Federal Regulations, Sections 49.0, 49.81, 49.71, and in Volume 49 of the Code of Federal Regulations, 72.5 and 73.6. Strike that last, please—73.86. Also in the Volume 14 Code of Federal Regulations, Section 49.3 b. Your Honor, our position in the case is that the interpretations of these regulations is prop-

erly a matter for the court and we will ask the court to instruct the jury concerning the legal effect of these regulations. Otherwise I would feel obliged to read those regulations to the jury if it's a matter for the jury to pass on.

The Court: Well, I don't know. I want to discuss with your your instructions and if they are covered in your instructions it may be a different thing, because I don't propose to take those regulations and tell the jury what they mean. I don't know what they mean. Now, have you covered them in your instructions?

Mr. Talbot: We have not quoted from a single one of them in the instructions. We have based the instructions [131] upon what we contend is the clear meaning of the regulations.

The Court: Well, I have read your instructions and I don't think it will be necessary to read the —may I do this: postpone the reading of the regulations until after we have discussed the instructions and if you feel the regulations should be read to the jury I will allow you to read the regulations.

Mr. Talbot: Yes, your Honor. Your Honor, Mr. Nesbett and I have stipulated that Pilot Haley kept his log in Greenwich Civil Time, and that where the figures 1900 hours appear in the log for—well, in the log or flight reports—that 1900 hours means 9:00 o'clock a.m. Big Mountain time. And similarly that where the figures 2000 hours appear in these documents that mean 10:00 o'clock a.m. Big Mountain time.

Mr. Nesbett: That is correct, your Honor.

Mr. Talbot: Your Honor, I call upon Mr. Nesbett to produce Pilot Haley's flight report for December 17, 1955. I offer in evidence as Defendants Exhibit L.

The Court: No objection. It may be received.

Mr. Nesbett: I object, your Honor.

The Court: Well, if you're going to object you better make your objection audible. I can't read your mind.

Mr. Nesbett: I thought your Honor would be looking at it and I'm sorry, your Honor. I object on the same ground, that flight reports for other days prior to the flight were [132] rejected by your Honor earlier in the trial. It has nothing to do with the loading of the airplane on the day in question. That's the only issue here that the jury will pass on. There's nothing else to my knowledge in that flight report that would be of any assistance to the court or the jury. Your Honor admitted yesterday a document, that that was the flight log of the airplane on the 17th on the ground that it might indicate the amount of gas aboard. This flight report indicates aboslutely nothing as far as the airplane is concerned except the hours flown. It's a report that was submitted to Morrison-Knudsen simply for payment on an hourly basis.

The Court: What is the purpose of the exhibit?

Mr. Talbot: Your Honor, this exhibit corroborates the log for one thing.

The Court: Well, there's no dispute as to the log. It doesn't need any corroboration.

Mr. Talbot: It will corroborate in several respects the testimony of the witness who has not yet been heard. I think perhaps, your Honor, I should offer it again later.

The Court: Well, I'll have this marked for identification only, and if it becomes material, why I will allow it to be introduced in evidence, but unless you can connect it up in some way, why I will sustain the objection.

Mr. Talbot: I will call upon Mr. Nesbett [133] to produce the flight report for December 18, 1955, or any portion thereof in the possession of the plaintiff.

Mr. Nesbett: We have, your Honor, what may or may not be the document that Mr. Talbot requests or a portion of the document. I might say, your Honor, that Cordova Airlines does not submit it and vouch for it as having been the authenticated flight report for that day.

Mr. Talbot: Your Honor, I would reoffer at this time Defendants Exhibit L for identification which is the flight report which Mr. Nesbett produced for the previous day in order that your Honor may compare and see the similarity in the handwriting, format, printing, etc. of these two documents.

The Court: Well, we haven't got the other document in yet. There's no necessity for introducing for the comparison until the second document gets in.

Mr. Talbot: I offer what appears to be the flight report for December 18, 1955.

Mr. Nesbett: We object to the admission, your Honor, on the ground that as is apparent from the exhibit itself it's badly mutilated, torn and possibly burned, and we have no knowledge ourselves of the authenticity of it.

The Court: May I inquire was the flight log destroyed or burned in the crash? Was it kept ordinarily in the airplane?

Mr. Talbot: I think Mr. Nesbett can answer that [134] better than I can, your Honor.

Mr. Nesbett: Was that kept in the airplane, your Honor?

The Court: Yes.

Mr. Nesbett: Those flight reports were something that was made out by the pilot to submit to the contractor for the airline to get payment for the hours of flying done. If they weren't required to be kept in the airplane undoubtedly on occasions they were in the airplane.

The Court: I think, counsel, you have got to lay a foundation. All you have done is produce the document. Now you have got to lay some foundation where the document came from and where it was discovered and just producing the document and offering it to be received I don't think is sufficient. You have got to lay some sort of a foundation.

Mr. Talbot: Very well, your Honor, of course——

The Court: It may be marked for identification

and if you can lay a foundation I will probably allow it to be received.

Mr. Talbot: Very well, sir.

Mr. Nesbett: That would be Exhibit M?

Deputy Clerk: Right.

Mr. Talbot: I'd like to call Mr. Smith again for a couple of questions. [135]

MERLE K. SMITH

resumes the witness stand, and having previously been sworn testifies as follows on

Cross-Examination

By Mr. Talbot:

Q. Mr. Smith, you are the same Mr. Smith who testified previously? A. I am.

Q. And you are the president of Cordova Airlines? A. I am.

Q. I direct your attention, Mr. Smith, to the flight on December 18, 1955, in which your company's aircraft Cessna 1569 "Charley" was destroyed. With reference to that flight, Mr. Smith, did Cordova Airlines secure written permission from Farwest General Agency of the Exchange Building, Seattle, Washington, as agent for the insurance companies to make that flight?

A. We did not. It wasn't required.

Q. Now with reference to that same flight on December 18, it is true, is it not, that the aircraft was engaged in carrying explosives?

A. I so learned, yes.

(Testimony of Merle K. Smith.)

Q. Now, Mr. Smith, in connection with that same flight did Cordova Airlines receive any certificate from the shipper of those explosives that that shipment of explosives complied with applicable Civil Aeronautic [136] Board regulations having to do with the carriage of explosives by air?

A. I don't really now. If there was a certificate, why Morrison-Knudsen would have had it. It might have been in the airplane and destroyed; I don't know.

Q. Have you made any effort to ascertain whether or not Cordova Airlines received this certificate required by law?

A. No, I haven't.

Mr. Talbot: No further questions.

MERLE K. SMITH

testifies as follows on

Redirect Examination

By Mr. Nesbett:

Q. You say you haven't made any effort to ascertain if such a certificate was received by Pilot Haley?

A. The only way it could have been received would have been by Pilot Haley and I presumed that Morrison-Knudsen took care of it.

Q. You have learned, of course, that the dynamite Pilot Haley was carrying was located at Iliamna Bay airstrip, have you not? A. Yes.

(Testimony of Merle K. Smith.)

Q. Has this map been introduced in evidence?

The Court: We have a map that was [137] admitted.

Deputy Clerk: Exhibit E.

Q. (By Mr. Nesbett): Mr. Smith, I hand you the Defendants Exhibit E which is a map of the Iliamna area of Alaska. Can you raise that map so that the jury can see you point, and will you, on that map, point and circumscribe with your forefinger the area occupied by Lake Iliamna?

A. This area, this spot in there. (Indicating.)

Q. Now will you roughly trace along the line of the Alaska Peninsula at the shore of Cook Inlet for the jury?

A. This right here, this is Cook Inlet.

Q. Now, Mr. Smith, where, with relation to Lake Iliamna and Cook Inlet, was Iliamna Bay airstrip included?

A. That little red mark right there, I believe is Iliamna Bay.

Q. Now, would that be the point of land between one edge of Lake Iliamna and Cook Inlet?

A. Yes.

Q. And is that where the dynamite was picked up by Pilot Haley?

A. At Iliamna Bay strip.

Q. Yes. Now, isn't it a fact that the map so indicates that that strip is located in, several miles inland from Cook Inlet with a road indicated on the map [138] connecting the strip with Cook Inlet?

(Testimony of Merle K. Smith.)

A. Yes; the road from the Cook Inlet side to there, that's right.

Q. Now, did Cordova Airlines have anything to do with getting the dynamite to Iliamna Bay airstrip? A. We did not.

Q. Do you know what agency caused the dynamite to be transported to the airstrip where Pilot Haley picked it up?

A. I presume that Morrison-Knudsen hauled it over there and probably went down to the Cook Inlet side of Iliamna by barge.

Mr. Talbot: I object, your Honor, to what the witness presumes.

The Court: It may go out. The witness can't testify as to what he presumes.

Q. Well, in any event, your airline had nothing to do with getting the dynamite to the strip, is that correct? A. That's right.

Q. Now, can you raise that map, Mr. Smith, for the jury and trace roughly the flying route that a pilot would or might fly to carry the dynamite from the Iliamna Bay airstrip to Big Mountain?

Mr. Talbot: Object, your Honor. No proper foundation. The pilot could fly any route, [139] presumably.

Mr. Nesbett: I said could or might.

The Court: Well, you know this is not proper cross-examination. There was nothing—counsel for the Defendant didn't ask any questions at all relative to this thing. This is a new subject entirely If you want to call this witness as your witness at

(Testimony of Merle K. Smith.)

the proper time it will be all right but I think you are limited now to the cross-examination as to the subject opened by the Defendant.

Mr. Nesbett: Your Honor, the only reason for this, I was going to mention in the next question or two was to indicate where a certificate such as he inquired about would have been received and who would have had it. In other words, that the dynamite got to Iliamna Bay through agencies unknown to Cordova.

The Court: Then what difference does it make whether he flew through the valleys or over the mountains or north or west?

Mr. Nesbett: Nothing. I said roughly the route. I will withdraw that question.

Q. (By Mr. Nesbett): Mr. Smith, will you point again to Big Mountain on the map? (The witness so complied.) Now, Mr. Smith, do you know whether or not Pilot Haley got a certificate from Morrison-Knudsen or any other agency at Iliamna Bay when that dynamite was loaded aboard your airplane? [140] A. I don't know.

Q. Would you have any way of knowing if the certificate had been received and was on the airplane at the time of the crash?

A. I wouldn't. I don't know how I would know.

Q. When did you learn of this defense of failure to receive such a certificate?

A. I don't—just exactly when I did first——

Q. You learned it first at the time the motion

to amend the Complaint was filed just at the commencement of the trial, didn't you?

A. Yes. Well, yes.

Mr. Nesbett: That's all.

Mr. Talbot: No cross.

The Court: Step down.

(Thereupon, the witness was excused and retired from the stand.)

Mr. Talbot: Your Honor, I would like next to read into evidence a portion of the deposition of Mr. Smith which was taken.

The Court: Of Mr. Smith?

Mr. Talbot: Yes, your Honor.

The Court: Well, now, I don't know whether you have a right to read the deposition of a witness who is in court. You can use a deposition as an impeachment purpose. [141]

Mr. Talbot: Your Honor, on May 24, 1958, we took the deposition of Cordova Airlines, Inc., by Merle K. Smith, its president. And I offer these—this portion of the deposition, not as impeachment but as party admissions and I have checked the point and I am satisfied that I'm entitled to do that. In fact, I have done it before.

Mr. Nesbett: Well, the fact that he's done it before has——

The Court: Well, now, do you object or don't you?

Mr. Nesbett: Yes.

The Court: Sustained. You have a witness here. You can ask him exactly the same questions from

the witness stand and if he doesn't answer them the same way you can impeach him but my understanding is that you cannot use the deposition of a witness in court if there is any objection.

Mr. Talbot: Might I have leave to furnish your Honor some authority on that point and defend this——

The Court: Yes; if you have any authority, I'll be glad to read it. What is it?

Mr. Talbot: Very well. I shan't bother with it at this time but I will at the first opportunity.

The Court: All right. May I clarify something? Can it be stipulated that this flight was known as Flight MK?

Mr. Nesbett: Flight MK, your Honor?

The Court: Flight No. MK. [142]

Mr. Nesbett: No, your Honor; never heard of any such designation.

The Court: Well, this is aircraft 1569-C?

Mr. Nesbett: That is the aircraft in question, yes, sir.

The Court: But you don't know anything about a flight No. MK?

Mr. Nesbett: Where does your Honor see that—on what?

The Court: Well, I see on this flight report.

Mr. Nesbett: Are you looking at the flight report that was offered in your Honor's——

The Court: I am looking at flight report 17.

Mr. Nesbett: On the 17th?

The Court: Yes, December 17.

Mr. Nesbett: Oh, well, apparently the pilot just

indicated the flight number instead of having number. It was charter work for MK and he apparently put it in there.

The Court: Well, let's have the flight reports that were refused admission yesterday. I think they were marked for identification, weren't they?

Mr. Nesbett: Yes, your Honor.

The Court: Do you still have them here?

Deputy Clerk: K and——

Mr. Talbot: Exhibit H, your Honor. [143]

Deputy Clerk: Oh, H.

The Court: Now I notice on these, on Exhibit H which is the flight reports for November 19, 20, 29, and December 5—it's flight number MK. Now I refused to allow these to be received in evidence upon the ground that it didn't make any difference as to the information contained because it didn't have any bearing upon the day in question, but now it has some bearing upon the flight number. Now I want either a stipulation that this was flight MK or I am going to allow the Defendant to prove it is MK by the introduction of these other flight reports.

Mr. Nesbett: Well, your Honor, apparently all of them are marked "Flight MK," so we will stipulate that as far as the flight number it was MK.

The Court: Then I noticed—the reason I am asking that, I notice that on Exhibit M which objection has been made to is also Flight No. MK, and Craft No. 1569-C. I am just calling that to your attention because it certainly does connect up the Exhibit M with the Flight No. MK, which was the

flight of the airplane being used in this particular activity.

Mr. Nesbett: Your Honor, we are certainly not trying to obstruct the production of facts in the trial. We know that that exhibit that we have objected to does have a heading that indicates that it was at one time a full sheet of flight reports or of a full sheet of flight reports used by [144] Cordova Airlines. It looks to be that from that patch-up certificate, and some of the words are legible, like "Flight Number MK." Some of it is not legible. We can't vouch for it as being the flight report for that day, although it appears to be made on the flight report paper.

The Court: All right. If the Defendant can lay the proper foundation, why I'll probably allow it to be introduced in evidence.

Mr. Talbot: Your Honor, I have located our authority for the admissibility of this portion of Mr. Smith's deposition. Rule 26 (d) (1) and (2).

The Court: Federal Rules?

Mr. Talbot: Yes, your Honor.

The Court: Let's see. All right. Rule 26 (d) (1)?

Mr. Talbot: (d) as in dog (1).

The Court: "Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as witness." That is proper. "(2): The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association which is a party may be used by an ad-

verse party for any purpose." All right. Where is your authority for that? Where's your cases? I'm not interested in the rule, I'm interested in what the court says the rule means. [145]

Mr. Talbot: Very well. We'll have to find them for your Honor.

The Court: If you can find the cases I'll change my ruling, but——

Mr. Talbot: Call Mr. Evans.

EDWIN E. EVANS

called as a witness on behalf of the Defendants and being first duly sworn upon oath testifies as follows on:

Direct Examination

By Mr. Talbot:

Q. Mr. Evans, would you please state your full name, sir? A. Edwin E. Evans.

Q. And you might get a little closer to that microphone. It works pretty well. Where do you live, Mr. Evans?

A. 836 Seventh Avenue, Anchorage.

Q. And by whom are you employed at the present time? A. Federal Electric Company.

Q. Tell me, were you employed by Morrison-Knudsen Company in December of 1955?

A. I was, sir.

Q. What was your position with Morrison-Knudsen at that time?

A. I was site superintendent.

Q. And what site?

(Testimony of Edwin E. Evans.)

A. Big Mountain, Alaska. [146]

Q. About when did you go to Big Mountain to be the site superintendent?

A. First of December.

Q. Of what year? A. 1955.

Q. Mr. Evans, what kind of a site was this? What were you building over there?

A. We were building a communication site for White Alice, known as the White Alice sites.

Q. It was not a radar site? A. Right.

Q. It had to do with some high frequency radio communication? A. It is.

Q. And that was under contract that Morrison-Knudsen, Western Electric had with the United States Air Force, was it not?

A. That's right.

Q. Did you ever meet a man named Herbert Haley? A. I did.

Q. When and where did you meet him?

A. I met him at the Iliamna air strip. That was the one between Iliamna Bay and the Iliamna Lake on the day I was in transit to the job.

Q. Now in your work at Big Mountain, did you have any aircraft available to you? [147]

A. We—the Cessna plane that Herb Haley was flying was the only one we had available on the site.

Q. That was this Cordova Airlines plane we're talking about? A. That's right.

Q. Was this Cordova Cessna already on charter

(Testimony of Edwin E. Evans.)

to Big Mountain when you took over as superintendent, or was it chartered later?

A. It was previous to my arriving there.

Q. Haley was already operating there?

A. That's right.

Q. What sort of work did Haley and his plane do for you?

A. It was chartered to do the—well, you might say run the lifeline for the camp, that it was to carry our passengers back and forth from Iliamna, the town of Iliamna, to carry any freight back and forth from Iliamna, and the mail and anything requested by the supervision on the site.

Q. You had an airstrip at Big Mountain, then?

A. That's right. Under construction at the time; it wasn't completed.

Q. When was it completed?

A. It was completed shortly after that so that larger planes could get in. It was suitable for small planes at the time of the accident.

Q. I see. Now, for how long were you superintendent there [148] at Big Mountain?

A. Until the 10th day of January, I believe it was, 1956.

Q. Mr. Evans, what other planes if any used the strip at Big Mountain while you were superintendent there?

A. I believe it was the Arctic Cargo used it to transport fuel oil to us and the Safeway Airways was in one trip with a small plane and the CAA

(Testimony of Edwin E. Evans.)

group of people used it the day they came in to inspect the crash.

Q. During the time you were there did any United States Air Force planes ever use that strip?

A. Not to my knowledge.

Q. Now, this Arctic Air Cargo plane—was that a private plane or Air Force plane?

A. That was I believe a private plane, privately owned company.

Q. When was the last time you saw Herb Haley?

A. The morning of the 18th day of December, 1955.

Q. Was he dead or alive?

A. He was alive.

Q. And did you see him dead afterwards?

A. Yes, sir.

Q. He died in this crash, did he not?

A. Right.

Q. Now, you were superintendent at Big Mountain. Who was the responsible official of Morrison-Knudsen Company who [149] customarily gave requests or directions to Pilot Haley as to what work he would perform? A. I was.

Q. Did you ever have occasion to ask Pilot Haley to move any dynamite for you?

A. Yes, which I did, I believe, on the evening of the 16th day of December. I asked Mr. Haley if he could and would haul the powder.

Q. By powder you mean dynamite?

A. That's right.

Q. That comes in sticks, does it not?

(Testimony of Edwin E. Evans.)

A. It does.

Q. What did you need the powder for, Mr. Evans?

A. In building a road to the site from lower base camp on the lake.

Q. Had to blast some rock out of the way?

A. Yes, and frozen ground.

Q. I believe you personally are experienced in the use of powder? A. I am.

Q. What was used to build that airstrip, what kind of equipment?

A. The kind of equipment that we had at the time was some D-8 Caterpillar tractors, Woolridge scrapers, an 80-D shovel and some end dump Eucs, 10-ton end dump Eucs. [150]

Q. How did all that heavy equipment get to Big Mountain? Was it flown in?

A. No, it was barged, as I understand it. It was prior to my time at the site. I understand it was barged to Iliamna Bay, transported overland over Portage Road to Pile Bay, loaded on barge at Pile Bay and taken to Iliamna to Big Mountain base camp.

Q. I believe you said it was on December 16 that you first asked Pilot Haley to move some dynamite for you? A. That is right, sir.

Q. Can you tell us when, on what date Pilot Haley actually moved the first dynamite for you?

A. On the day of 17th day of December, 1955.

Q. Did you direct Pilot Haley to move the dynamite or request him to do it?

(Testimony of Edwin E. Evans.)

A. I requested him.

Q. Did you tell Pilot Haley how much dynamite to carry? A. I did not.

Q. Did you give Pilot Haley any written certificate that the shipment of explosives which he was to carry complied with regulations of the Civil Aeronautics Board with respect to the transportation of explosives? A. I did not.

Q. Do you know whether or not anyone else at Morrison-Knudsen gave such a certificate to Pilot Haley? [151] A. I do not.

The Court: That is you do not know?

A. I do not know, sir.

Q. Then Pilot Haley made his first trip carrying dynamite on December 17th?

A. To my—to the best of my knowledge that was it, yes, if I remember right.

Q. Do you know how much dynamite he carried on the first trip on the 17th? A. Yes——

Mr. Nesbett: I object, your Honor, as having been clearly irrelevant. He doesn't know it was the 17th for certain, and——

The Court: Overruled. The question is did he know and he says yes. But I will sustain the objection as to the amount.

Mr. Talbot: Your Honor, may I suggest the relevancy of this?

The Court: Not necessarily. You know this is somewhat akin to an automobile accident. You can't prove negligence by proving that the driver has been negligent before, the day before or even the

(Testimony of Edwin E. Evans.)

minute before. You have got to prove negligence at the time of the accident.

Mr. Talbot: That's not my point at all.

The Court: If there is an overload here you can't [152] prove that by showing on the 17th that there was an overload.

Mr. Talbot: Absolutely cannot.

The Court: What was your purpose, then?

Mr. Talbot: Two purposes. One, to show that there was space in the plane that could accommodate 16 cases of this dynamite, and, secondly, it has a good bearing on the question of gasoline consumption, to show that on the two flights on the 17th he was similarly loaded and followed a similar route. Now we do have some information about how much gas he burned on two trips on the 17th and I propose to divide that in half for the one trip on the 18th. That's the only purpose for this, your Honor.

The Court: Well, for that limited purpose I will overrule the objection.

Q. (By Mr. Talbot): Do you know how much dynamite was carried on Haley's first flight on the 17th? A. Yes, sir.

Q. I believe your answer was yes?

A. Yes.

Q. How much did he carry?

A. 16 boxes—16 cartons.

Q. How do you know he carried 16 cartons?

A. Because I helped him unload—showed him where to store it. [153]

Q. Did you actually participate in the unloading

(Testimony of Edwin E. Evans.)

of that first load? A. I did.

Q. Carried some of the boxes yourself?

A. I did.

Q. Now, did Pilot Haley make a second trip on December 17th carrying dynamite?

A. Yes, to my knowledge he did.

Q. How do you know that?

A. Well, because later on the powder was in the —I did not see him unload the power but the powder was in the magazine.

Q. At Big Mountain?

A. At the Big Mountain site.

The Court: The only way you could get over was by flying it?

A. That is right, sir, at that time of the year.

Q. Now, on the 18th of December, 1955, where were you when you first learned that Pilot Haley had crashed?

A. I had just arrived back at the base camp, in the office.

Q. And who advised you that there had been a crash?

A. One of the crewmen, an oiler, heavy equipment and oiler, rather.

Q. What did you do when you were advised there was a crash?

A. I picked up my office clerk and my assistant office clerk [154] and my first aid man and we rushed in some fire extinguishers and rushed to the plane.

(Testimony of Edwin E. Evans.)

Q. What did you find generally when you got to the plane?

A. Well, it was pretty badly mangled up and still burning.

Q. The plane itself was still burning?

A. Well, the gas tank on one side of the plane was still smoldering and smoking, yes.

Q. Where was Pilot Haley?

A. His body was laying just a few feet off to the front and left of the wreckage, from the crash end.

Q. Was he dead? A. Yes, he was.

Q. Did you take any pictures of that scene yourself, Mr. Evans? A. I did not.

Q. I hand you a couple of photographic prints, Mr. Evans, and ask you if you have ever seen those before? A. Yes, I have.

Q. You gave those to me yesterday, did you not?

A. That is right.

Q. Where did you get them?

A. I got them from my first aid man, George Ammon, that I had requested to take the pictures at the time.

Q. Now, do you have in your mind a clear memory and recollection of that scene? [155]

A. I do.

Q. Can you tell us whether or not those photographs accurately represent the scene as you remember it? A. Very well.

Mr. Talbot: I believe I will offer those, your

(Testimony of Edwin E. Evans.)

Honor. I do offer them together as Defendants Exhibit N.

Mr. Nesbett: I will object, your Honor.

The Court: What grounds?

Mr. Nesbett: Were you there when those pictures were taken, Mr. Evans?

A. I was.

Mr. Nesbett: Did you see your first aid man take them?

A. I did.

Mr. Nesbett: And do you know that those are the pictures that he took at the time you directed him to take them?

A. Well, the only way I can say is that I do believe they are.

Mr. Nesbett: Did——

The Court: Well, would you say that that is a fair representation of the scene on the morning of the accident?

A. Yes, it is.

The Court: I think that is all that is necessary. Objection overruled. It may be received in evidence.

Mr. Talbot: May I have, your Honor, Defendants Exhibit D for Identification? [156]

Q. (By Mr. Talbot): Mr. Evans, I hand you an additional series of 9 photographs numbered 1 through 9 which has been marked as Defendants Exhibit D for Identification, and ask you to examine each one of those photographs and the caption underneath. Read the caption to yourself and then tell us whether or not those photographs ac-

(Testimony of Edwin E. Evans.)

curately represent the scene and whether or not the captions underneath are accurate—that is, whether or not what it says in the caption, whether that actually appears in the picture as you remember the scene.

A. Photo No. 1—would you like that I read you caption under the picture?

The Court: Read it to yourself and tell us whether or not that is the fair representation of the scene of the accident as you remember it.

A. It is, sir.

Mr. Talbot: Shall I offer these individually?

The Court: No; let him look at the entire group.

A. No. 2, yes, very much so. No. 3, yes. No. 4, yes; No. 5, yes; No. 6, yes, and No. 7, yes. No. 8, yes; No. 9, yes.

Mr. Talbot: I offer the group of photographs, your Honor, as Defendants Exhibit D.

Mr. Nesbett: Object again, your Honor, on the same ground and I'd like to ask the witness a question or two. [157]

The Court: You may ask the questions.

Q. (By Mr. Nesbett): Do you know who took those pictures? Do you know of your own knowledge who took the pictures?

A. That I do not.

Q. When did you first see them, Mr.——

A. I first seen that group of pictures—I believe it was the day before yesterday.

Q. In Mr. Talbot's office?

A. Yes, the day before that, rather, Saturday.

(Testimony of Edwin E. Evans.)

Mr. Nesbett: I submit, your Honor, that they are not admissible.

The Court: Well, I don't know how the Plaintiff can be harmed by the introduction of those pictures. I don't think that those pictures either prove or disprove any of the issues in this case. The testimony has been that the plane was destroyed. It crashed and was destroyed. Now it isn't a question of what happened to the plane after it hit the ground. The question is what caused it to hit the ground, whether or not it was being operated the way the policy provided it be operated, not what happened after the plane had struck the ground. I don't personally—I don't think it makes any difference one way or the other whether they be introduced or not introduced. I don't think they benefit the Defendant any; I don't think they harm the Plaintiff any. [158]

Mr. Nesbett: Well, it could be prejudicial, your Honor, on the horror of a plane carrying dynamite and crashing and an allegation that dynamite amounted to unlawful purpose of flight that—if they are irrelevant, why bother the jury with them?

The Court: Those pictures may establish the fact that the stipulation is that dynamite never exploded.

Mr. Nesbett: Well, that's true.

The Court: Objection is overruled. The pictures may be received in evidence.

Mr. Talbot: Thank you, your Honor.

The Court: Now I am allowing the pictures to

(Testimony of Edwin E. Evans.)

be introduced, but the writing under the bottom of the pictures, I don't know. Let me see the photographs, will you? (The photographs were handed to the Court.) Well, I'll order the clerk to take scissors and to cut off the notations on the bottom of the photographs. Otherwise the photographs can be received in evidence.

Mr. Talbot: If that could be done, at this time I want to question the witness some more about those photographs.

The Court: Well, while we are waiting for the clerk, I want to ask the witness a question. You went over there immediately after the accident, didn't you?

A. Just as soon as I could get back there, sir.

The Court: And did you say the plane was burning? [159]

A. Yes; one gas tank on one side was still smoldering.

The Court: Did you put out the fire?

A. There was nothing there to—that warranted to put out the fire. We didn't see we could do any good to anything, and we left the evidence as it was.

The Court: After the fire had burned down and the plane was cool, did you attempt to locate the dynamite?

A. No, the dynamite was scattered right over the area.

The Court: Well, there was so many boxes of dynamite. Was the dynamite in the boxes?

(Testimony of Edwin E. Evans.)

A. No. No, sir, the boxes had all separated and the dynamite was scattered over the area.

The Court: Did you count and see how many boxes there were?

A. I did.

The Court: How many boxes did you find?

A. 16 boxes, sir.

The Court: You found 16 boxes. The dynamite was out of the boxes?

A. That's right.

The Court: I suppose these boxes you found were dynamite boxes—they weren't cracker boxes or something like that?

A. That is right, sir. They were the containers that dynamite is usually transported in, with the original [160] markings of the manufacturer and the strength of the powder.

The Court: And what was the weight of these boxes? Any weight on them?

A. The weight of the boxes, 50 pounds net.

Deputy Clerk: It's all right to leave the photo number on?

The Court: Yes, you can leave the photo number on them and the notations may be marked for identification as Exhibit D-1, so they can be in the file at least.

Well, I notice it's 11:00 o'clock and while the clerk is getting the photographs ready I think we will take our morning recess. Ladies and gentlemen, we are about to take another recess. It's my duty to admonish you you are not to discuss this case

(Testimony of Edwin E. Evans.)

with anyone; you are not to allow anyone to discuss it with you. You are not to formulate the rights of the parties until this case is finally submitted to you. With that admonition the court will stand in recess until 15 minutes after 11:00.

(Whereupon, at 11:15 o'clock a.m., June 3, 1958, court reconvenes following a 10-minute recess, the jury having resumed their places in the jury box, and the following proceedings were had:)

The Court: Is it stipulated that the jury is [161] present in the box?

Mr. Nesbett: Yes.

Mr. Talbot: Yes, your Honor, we have under the old Code of Civil Procedure an obscure provision that I had a hard time finding last night, but it's Section 58-4-64 and it provides as follows: "Whenever a writing is shown to a witness it may be inspected by the adverse party, and if proved by the witness shall be read to the jury before his testimony is closed, or it shall not be read, except on recalling the witness."

Now, our position is that that is a procedural rule which was superseded by the Federal Rules and that the question of when exhibits are read to the jury or whether they are read is in the sound discretion of the court.

The Court: Well, if you want to read an exhibit to the jury I will allow you to read it any time you want to read it.

(Testimony of Edwin E. Evans.)

Mr. Talbot: Thank you.

The Court: If you want to read it at the time it's introduced, it's perfectly all right with me.

Mr. Talbot: Well, I didn't want to have to recall Mr. King on account of that one exhibit yesterday, and——

The Court: No.

Mr. Talbot: Very well.

Mr. Nesbett: Now, your Honor, on that point, just to speak for a moment, it would seem that the reason for the [162] rule is a good one. If the exhibit is read it may afford additional opportunity for counsel to examine the witness at the time he is there. In other words, to——

The Court: Not necessarily; if the exhibit is in evidence the jury has a right to look at the exhibit. They can read it for themselves.

Mr. Nesbett: That is true.

The Court: And what difference does it make if counsel wants to read it?

Mr. Nesbett: Well, the only difference being that it might suggest to methods of examining the witness at the time he's there with the document that he is identifying.

The Court: Well, now, let's pass this up and when the time comes I will rule on it. There's nothing before the court.

Mr. Talbot: May I have the photographs, Defendants Exhibit D? (The exhibit was handed to counsel.)

Q. (By Mr. Talbot): I hand you Photograph

(Testimony of Edwin E. Evans.)

No. 1, Mr. Evans, and point out to you on the foreground certain depressions in the ground in the foreground of that picture and would you please show the picture to the jury? Hold it up.

The Court: Well, now ask the question.

Mr. Talbot: Very well, your Honor.

Q. Do you know what caused those depressions in the foreground [163] of the picture there?

The Court: Just a minute—I'll sustain an objection because he wasn't there and he said that was a fair representation of the scene of the accident. I didn't allow him the pictures to minutely describe anything. The pictures are before the jury and the jury can draw their own conclusions. Purely a conclusion of this witness as to what caused those depressions.

Mr. Talbot: Very well, your Honor.

The Court: There was a crash. That's all there is to it. There was a crash and whatever happened after the crash is entirely immaterial.

Q. (By Mr. Talbot): I hand you Photograph No. 2, Mr. Evans, and ask you if that photograph shows any of these dynamite boxes that you have testified to in answer to the court's questions.

A. Yes, I'll say that it does——

Q. I hand you Photograph No. 3 and point out to you a box which is in the foreground of that picture. Can you——

Mr. Nesbett: I'll object to the question on the same grounds your Honor stopped the witness before. He's pointing to the picture and says, "This is

(Testimony of Edwin E. Evans.)

a box," and is going on with a question. First he assumes it's a box. These are pictures that Mr. Evans had nothing to do with the taking of. He doesn't know who took them. [164]

Now he's using them in intricate, detailed fashion and practically to testify as though he took them himself.

The Court: Overruled.

Q. Mr. Evans, what appears to be a box in the foreground there, can you tell us what kind of a box that was?

A. Yes, sir; it's a cardboard carton that it was a dynamite container.

Q. Did you place that dynamite container there or was it found at the scene?

A. That dynamite box was laying exactly as it was after the crash.

Q. Mr. Evans, I hand you a box and ask you if the box which I have handed you resembles in any way boxes which you found at the scene of the crash? A. It does.

Q. Point out the similarities, if any, between the box you have before you and the ones you found at the scene?

A. The size, the quality of the box and the markings on the box.

The Court: These 16 boxes that you found that had markings, "Atlas Powder Company," did it?

A. Yes, sir, as I recall. I'm sure it was the Atlas Powder Company, as I remember, it was the Atlas Powder Company.

(Testimony of Edwin E. Evans.)

Q. Mr. Evans, I will ask you to look inside that box that you have before you and tell me what's in it? [165]

A. Well, there's some wax paper and small quantity of sawdust.

Q. Is there anything else in the box?

A. No, there isn't.

The Court: Was that the size box in which this powder was shipped?

A. That's right, sir.

Q. When you unloaded that first shipment of dynamite along with Pilot Haley, was that the type of box you unloaded? A. That's right, sir.

The Court: And it has marked on it, "50 pounds," is that right?

A. Yes.

Q. Now, Mr. Evans, have you had any familiarity yourself with the use of dynamite of this type?

A. Yes, I have. This is the first experience, let me explain to the court, that I have ever had any experience with cardboard carton. This powder that I handled when I handled powder, it all came in wooden containers.

Q. Now, of the cartons of dynamite which were delivered to the site at Big Mountain by Pilot Haley before he crashed, did you use some of that dynamite in your work?

A. Not previous to the accident.

Q. No, I mean subsequent to the accident?

A. Yes. [166]

Q. Did you observe how that dynamite was

(Testimony of Edwin E. Evans.)

packed? That is, what was in the box in addition to dynamite?

A. Wax paper and the sawdust that is usually in a container preserving the powder.

Q. Similar to what is in that box now?

A. That is right, sir.

Q. Mr. Evans, did you and I together weigh that box in the condition that it is now in?

A. We did.

Q. How did we do that?

A. We went to the post office and had the girl in the post office weigh it on the Government scale.

Q. That was the parcel post scale, the main branch of the post office here in Anchorage?

A. Right.

Q. In this building? A. Yes.

Q. What did it weigh?

A. 3 pounds and 5 ounces.

The Court: Well, we have a stipulation here that the dynamite weighed 50 pounds. The box says 50 pounds. Am I not right in assuming that the entire weight, the gross weight of the package was 50 pounds?

Mr. Talbot: No, your Honor. Our stipulation was 50 pounds net and that word was in the stipulation and it's in [167] my written account of our stipulation. I'm sure Mr. Nesbett will agree with me.

The Court: 50 pounds of dynamite plus the weight of the box?

(Testimony of Edwin E. Evans.)

Mr. Nesbett: That is true, your Honor.

The Court: All right.

Mr. Nesbett: I have also stipulated that this box is typical of the boxes that were carried by Pilot Haley over that period of time.

Mr. Talbot: I offer it as Defendants Exhibit O.

The Court: It may be received. And how much did you say the box weighed?

A. 3 pounds, 5 ounces, your Honor.

Q. (By Mr. Talbot): Mr. Evans, after the crash did you make an examination of the fusilage of this aircraft to see what, if anything, still remained inside?

A. Well, not too close of an observance, because I didn't want to molest the evidence in any way until it was inspected and we had permission to move the wreckage.

Q. What inspection did you make?

A. We walked around the plane and looked it over and could see what—more or less what the contents were inside from a distance, but there was absolutely nothing touched in any way to my knowledge, not by myself, anyhow, until [168] the CAA and the Commission had inspected the plane.

Q. Now, at the scene of the crash did you observe any personal effects or other articles such as the pilot may carry in the plane?

A. Yes; I did.

Q. Tell us what such items you remember seeing at the scene?

A. I remember seeing a few small cans of ra-

(Testimony of Edwin E. Evans.)

tions. I remember seeing a sleeping bag; I remember seeing a parka; I remember seeing a rifle; I remember seeing an axe, and I remember seeing a camera.

Q. Did you at that time and place have occasion to make an estimate of the weight of those items of personal effects, we'll call them?

A. Yes. As I recall, we were talking about the weights of the load which was not too much of an interest to me because I wasn't too familiar with what a plane was capable of hauling, but George Ammon, my first aid man, and myself felt that there was possibly 70 pounds of personal gear.

Q. Would you be certain, Mr. Evans, that there was at least, say, 35 pounds of personal gear?

A. Yes, I would say that, would be sure of that.

Q. That would be the safe side?

A. Yes.

Q. Where did Pilot Haley get his [169] gasoline?

A. That question as to where it was purchased, I couldn't say, but he did bring his gasoline in in 10-gallon carboys or two 5-gallon cans in wooden carboys and stored down in what we called the "Lagoon." That was a small ice strip down at the base camp and that is where the man serviced his plane whenever it was serviced.

Q. Then Pilot Haley maintained a stock of gasoline at the Lagoon? A. That is right.

Q. Did he use that stock of gasoline to put gas in his tanks before flight? A. That's right.

(Testimony of Edwin E. Evans.)

Mr. Talbot: You may examine, sir. Oh, I beg the court's pardon. There is one important item I overlooked. May I have Defendants Exhibit M for Identification? That's that fragment of the document. (The exhibit was handed to counsel.)

Q. Mr. Evans, I hand you Defendants Exhibit M for Identification, which is a fragment of a document called a flight report printed at the top and ask you to look at that closely, including the dates and figures that are inserted there and tell the court and jury whether or not you have ever seen that document before? A. Yes, I have.

Q. When did you first see that document?

A. Shortly after George Ammon, the first aid man, picked it up. [170]

Q. Where did George Ammon pick it up?

Q. Just outside of the wreckage of the plane.

Q. On what date, if you remember?

A. I couldn't be sure of that, whether it was the 18th or the 19th.

Q. It could have been the day following the crash?

A. It could have been the day following.

The Court: You are sure that was found at the scene of the accident?

A. Yes, sir. I was there when Mr. Ammon picked the thing up, picked it up in pieces, held it in his hand and it was later when the CAA took the photostat of it.

The Court: And you are talking to the jury.

(Testimony of Edwin E. Evans.)

not—you are not trying to convince me, you are trying to convince the jury.

A. I'm sorry.

Mr. Talbot: I offer Exhibit M in evidence, your Honor.

Mr. Nesbett: Object on the same ground, your Honor.

The Court: It may be received in evidence. I think it's been connected up. It's been connected up by the flight numbers and the name of the numbers on the plane.

Q. (By Mr. Talbot): I will ask you this, Mr. Evans, with reference to the movement of dynamite from Iliamna Bay to Big Mountain: [171] Did you undertake that on your own initiative or on instructions from your home office?

A. I took it on the instructions from my home office.

Mr. Talbot: Now you may examine, sir.

EDWIN E. EVANS

testifies as follows on:

Cross-Examination

By Mr. Nesbett:

Q. How did you receive those instructions from your home office, Mr. Evans?

A. They were verbal instructions issued to me by Mr. Ralph Pritchard, my superintendent, my supervisor.

Q. Pritchard? A. Pritchard.

(Testimony of Edwin E. Evans.)

Q. Where was Mr. Pritchard stationed?

A. He was stationed—he was the field man. His home office was here in Anchorage, but he was the man that covered the complete field at the time.

Q. And he was your immediate superior, was he?

A. That's right, sir.

Q. Mr. Pritchard owned an airplane or half interest in an airplane that was flying with Circle Trail Airways or Bill Smith's Airways in that area at that time, wasn't he?

Mr. Talbot: Object, your Honor. [172] irrelevant.

The Court: Overruled. You can answer.

A. Not to my knowledge.

Q. Do you know that Pritchard owned an airplane that Bill Smith was flying at all?

A. Later on.

Q. Later on? A. Yes.

Q. And Bill Smith and Pritchard were flying that airplane commercially, were they, on charter flights?

A. Not to—that's beyond me. I have no knowledge of that, sir.

Q. Did Pritchard, Mr. Pritchard come to the site and give you verbal orders to move the dynamite then? A. Yes.

Q. I see. Now, I believe—are you still with MK? You're not—you're with Federal Electric, aren't you? A. I'm with Federal Electric now.

Q. Do you recall the approximate date you left the employment of Morrison-Knudsen?

(Testimony of Edwin E. Evans.)

A. Yes, I left them on the—well, the exact date the day after Thanksgiving. When was Thanksgiving——

Q. Well, Thanksgiving of what year, sir?

A. This year.

Q. Of 1956? A. 1957. [173]

Q. 1957? A. Yes.

Q. Now, Mr. Evans, do you have any interest in the outcome of this case?

A. None whatsoever.

Q. None whatsoever?

A. None whatsoever.

Q. Now, I believe you testified, did you not, that you had occasion to estimate the personal effect strewn around the wreckage as being 70 pounds?

A. Yes, sir.

Q. Was that at the time of the crash or immediately thereafter when you went up to visit the scene?

A. It was shortly after. I believe it was Sunday afternoon, the day of the 18th.

Q. Did you—— A. We——

Q. Pardon me. Did you, in estimating the weight at 70 pounds, go around and life various articles and check them to see——

A. No, sir. The reason that I am saying——

Q. I didn't ask you the reason. I asked you what you did, sir. A. No, sir.

Q. Did you make a list of the articles so that you could [174] consider them as a whole in estimating them to be of 70 pounds in weight?

(Testimony of Edwin E. Evans.)

A. George Ammon made a list of it.

Q. George Ammon. Well, who made the estimate of weight?

A. Well, just roughly between Mr. Ammon and myself.

Q. Did you make the estimate or Mr. Ammon?

A. I believe Mr. Ammon did.

Q. Then you didn't make the estimate of 70 pounds at all, is that correct?

A. That's right.

Q. And you think 35 pounds, on second thought, might be more accurate or would you say that that was at least the weight?

A. Well, I would say that you would be sure of it being 35 pounds, I'll put it that way.

Q. Well, now, was Mr. Haley's body lying over there to the left of the airplane while you were doing this or was it later on in the day?

A. It was after the body had been moved.

Q. And after the body had been moved you went up and commenced to estimate the weight of the personal effects that Haley might have had in the airplane, is that about the size of it?

A. Well, yes, I believe it was.

Q. Mr. Evans, did you testify in response to a question on [175] direct that you counted 16 boxes of dynamite cartons in the area of the wreckage?

A. I did count 16 boxes of cartons, containers.

Q. 16 containers in the area?

A. Yes, sir.

(Testimony of Edwin E. Evans.)

Q. Did you do that immediately after the accident? A. Shortly after.

Q. How soon afterward?

A. Sunday afternoon, the day of the 18th.

Q. Had anyone had an opportunity to disturb or move any of the wreckage?

A. No, they had an opportunity but I'm sure that there was nothing disturbed in any way. They had strict orders not to disturb it.

Q. You were camp site supervisor, were you not?

A. That is right.

Q. Were your orders to the effect that no one should disturb the area of the wreckage?

A. That is right.

Q. And do you feel reasonably sure that no one did disturb it?

A. I am very sure that it was not disturbed at all until the inspectors were there, except for remove the body.

Q. Did you count—you are sure you counted 16 cartons in that area? [176]

A. That's right, sir.

Q. I will ask you whether or not you had occasion to talk with one—with a Mr. Clark representing the Civil Aeronautics Board shortly after the accident? A. Some; very little.

Q. Didn't you tell Mr. Clark shortly after the accident that the best you could see was approximately 8 cartons in the area of the accident?

A. I did not, sir.

Q. You refused to sign a written statement for

(Testimony of Edwin E. Evans.)

Mr. Clark, didn't you? A. No, sir.

Q. You did not refuse to sign a written statement for Mr. Clark?

A. I was never requested or asked to sign a statement.

Q. Then your testimony is you did not sign a written statement for Mr. Clark and you did not refuse to sign a written statement for him?

A. That is right, because I was not asked to sign one.

Q. Did you tell Mr. Clark you wouldn't sign one if one was prepared and you were asked to sign it? A. I did not.

Mr. Nesbett: May I see Photograph 2 of Exhibit D?

Q. I hand you Photograph 2 of Defendants Exhibit D, Mr. Evans. Are those relatively square objects pictured on [177] the ground in the area of the fusilage the dynamite cartons that you saw at the scene of the wreckage?

A. These in this picture, I would say yes.

Q. Are those cartons similar to this carton?

A. That is right, sir.

Q. Did you count such cartons in the area of the scene of the accident in order to arrive at the figure of 16? A. I did, sir.

Q. And did you find any of the boxes of dynamite with any dynamite left in them?

A. No, not to my knowledge.

Q. There were sticks of dynamite scattered over the whole area? A. That is right.

(Testimony of Edwin E. Evans.)

Q. Some of the sticks were broken, some charred, were they not? A. That's right.

Q. And no box was intact, was it?

A. No, definitely not.

Q. Some of the cartons had burned, had they not? A. No.

Q. None had burned?

A. None had burned.

Q. None whatsoever?

A. To my knowledge there was no burned [178] cartons.

Q. Did you count 16, then, cartons—whole cartons?

A. I counted 16 of what I figured were the tops of the cartons with the manufacturer's name and so that I was sure I did not get the bottoms mixed in with the tops.

Q. Were you there while Mr. Clark of the Civil Aeronautics Board was there examining, too?

A. I was.

Q. Did you attempt to assist him in any fashion?

A. Just to answer questions that he asked.

Q. Well, you were there at the time he was investigating and examining the scene of the accident, weren't you? A. Right.

Q. Did you attempt to assist him in determining how many cases or boxes of dynamite were on that plane? A. I did not.

Q. Did you help him to gather up or collect in one spot the remainders of the cartons that were there? A. No, sir.

(Testimony of Edwin E. Evans.)

Q. Is it your testimony that you yourself investigated and found 16 box tops?

A. That's right.

Q. Were you excluding the box bottoms?

A. Right.

Q. Now, some of the box tops were burned, were they not, partially burned? [179]

A. Could I make a suggestion, please? The gases from the inside of that box is liable to give somebody a headache.

Q. Well, would it hurt anyone at this distance?

A. Maybe not.

Q. Well, is there a possibility that it might?

A. It's very possible.

Q. There are 2 sections to each box, is there not?

A. That's right.

Q. And did you count 32 sections in the area of that wreckage?

A. I wouldn't say that I counted 32 sections. I counted 16 sections, enough to make up 16 cartons.

Q. Mr. Evans, why were you so concerned to go around counting the carton tops?

A. I have to see that there was a record kept of the materials that was used and consumed on the base, on the site.

Q. And is that the reason you went around checking box tops? A. That's right.

Q. Was there no other method you could have determined how many boxes were on that airplane?

A. Not to my knowledge.

Q. Not to your knowledge?

(Testimony of Edwin E. Evans.)

A. That's right.

Q. And did you find the 16 bottoms to the [180] cartons?

A. I—as I say, I didn't count the bottoms. I checked through and got enough tops to make sure that there was a—there had been a container.

Q. Well, and they were Atlas carton tops?

A. I'm sure they were. I could be wrong, but it seems to me, it runs in my mind it's so long ago, that it was Atlas powder.

Q. Well, you said previously on direct that you could be wrong, you didn't know whether it was Atlas or some other brand? A. I did.

Q. Wouldn't you have a remembrance of the brand if you'd gone around and counted 16 box tops?

A. Well, it seems like I should, but I do not remember, sir.

Q. But you do remember counting 16 tops?

A. Right.

Q. Were all those—were all those tops intact and together? A. No, sir.

Q. Then you had to take pieces of tops and put them together in order to piece out a whole top and determine here's one top, is that correct?

A. They were mangled, sir, and tore up some, sir, but there wasn't—not tore so bad that you couldn't tell it was a complete top. [181]

Q. They were not all intact, in one piece, the tops I refer to?

A. Well, I wouldn't say all of them intact. There

(Testimony of Edwin E. Evans.)

might have been a little corner torn off. There was enough of them tore up a little bit that you could tell the top.

Q. There were sticks of dynamite scattered all around the wreckage, some broken, some charred, some laying there intact? A. Right.

Q. Now, is it your testimony that all that dynamite got out of the box without tearing the tops into fragments?

A. That is my testimony, sir.

Q. That the tops were all intact?

A. I didn't say they were all intact. I said they were broken up some but they were straining together enough that you would tell—could tell they were a box top.

Q. Did you have to put fragments together at all in any instance in order to piece out a whole top? A. No.

Q. You did not? A. I didn't.

Q. In other words, the top was there in one piece, enough intact sufficiently to call it a whole top? A. Yes, remains of a whole top. [182]

Q. The top was not separated in any instances in 2 pieces, is that correct?

A. Yes. As I say, it was separated in 2 pieces to the extent that corners were torn off and the end probably busted out of it.

Q. Some of them were separated in many more than 2 pieces, weren't they, the tops?

A. To my recollection, I can't recall them being separated more than that.

(Testimony of Edwin E. Evans.)

Q. Then is it your testimony that you didn't have to piece together any single top in order to determine that there was one whole top?

A. That's right.

Q. And you were able to just walk around and count 16 tops?

A. It took some recheck on it.

Q. And a recheck? A. 16 boxes.

Q. I'm talking about your first check. I believe your testimony was you counted 16 boxes of dynamite in the area of the wreckage? A. Right.

Q. And you counted 16 tops and were able to identify them immediately in the area of the accident, disregarding the bottoms. Is that your testimony? A. That is my testimony. [183]

Q. And you did that immediately after the wreckage?

A. Shortly after. I couldn't—wouldn't say immediately after.

Q. Well, on the same day? A. Yes, sir.

Q. That was a Sunday, wasn't it?

A. That's right.

Q. And you disregarded the bottoms?

A. That's right.

Q. How far were those box tops, generally speaking, from the area of the fusilage, wreckage?

A. Well, some was right near the wreckage and some was the extent of 75 feet or more from the wreckage.

Q. I see. Generally 75 feet would describe the diameter of the area surrounding the wreckage that you found the box tops?

(Testimony of Edwin E. Evans.)

A. Well, it wouldn't cover the diameter. I would say that the right-hand side next to the road the boxes were approximately 75 feet on the right-hand side. They were not near so far from the plane.

Q. 75 feet would be the maximum distance of the area, would that be right, in any given direction? A. Yes; right.

Q. Now, can you look at Photograph No. 2 of Exhibit D and state whether that picture covers an area within 75 feet [184] on each side of the area of the wreckage of the fusilage?

A. I would say approximately 75 feet. I may be off 10, 15 feet but I'd say that, your Honor, that it's—I would say about 75 feet.

Q. And that picture, Mr. Evans, should show somewhere in there in some fashion the 16 box tops that you saw at the time, shouldn't it?

A. It should.

Q. Shouldn't it? A. Uh-huh.

Q. Also in the picture would be the 16 box bottoms that were also part of that load, if your testimony is correct; wouldn't they be in the same picture? A. Well, it's very possible they are.

Q. They should be?

A. To the right here, it could be. I couldn't say that this covers the outside 75 feet to the right of the picture as I look at it, but——

Q. Well, you just said you thought it did within 10 feet one way or the other?

A. Okay, we'll leave it that way.

Q. All right. Then that picture should show in some fashion or other the 16 intact box tops that

(Testimony of Edwin E. Evans.)

you saw in the area right after the wreckage as well as the [185] 16 box bottoms, also, shouldn't it?

A. Right.

Q. Can you look at it and point out—strike that. Can you look at that picture and mentally total the number of objects that in your opinion would represent a box top or bottom and then strike a mental total of the box tops you see in the area?

A. Well, not from the picture you couldn't.

Q. Well, now, why can't you from the picture?

A. Because you can't in the picture because it doesn't bring out the reading.

Q. Doesn't bring out the reading on the carton as to whether it would be a top or bottom?

A. That is right.

Q. Can you count the total and determine whether there are 32 objects which would be either a box bottom or a box top?

A. No, sir. Not from the picture I couldn't.

Q. Well, there are some objects in view there that certainly appear to be either a top or bottom of a box, aren't there?

A. Well, it could be maybe brought out and magnified to that effect, but I wouldn't state by looking at this picture just which is which.

Q. But aren't there some objects in that picture that [186] obviously are either a box top or box bottom? A. That's right.

Q. Now if the box tops were all intact, presumably the box bottoms were reasonable intact, were they not? A. Uh-huh.

(Testimony of Edwin E. Evans.)

Q. You should then therefore be able to see approximately 32 objects in that picture that would be either a box top or box bottom, isn't that right.

Mr. Talbot: Object to that, your Honor.

The Court: Sustained. You are arguing with the witness and I don't know anything to say that these boxes should be one one side of the plane or the other. It was a crash. I don't know which way the boxes went.

Mr. Nesbett: He said, your Honor, some on one side and some on the other, as I recall.

The Court: I know, but there may be some behind the plane, too, that you can't even see. But you are arguing with the witness.

Mr. Nesbett: Well, your Honor, certainly I wouldn't want to suggest that your Honor might assist the witness in his testimony. He either knows what he's talking about or he doesn't. If there is an area behind the plane——

The Court: You can argue to the jury about the witness' effect to the testimony but you can't argue with the witness. [187]

Q. (By Mr. Nesbett): Well, Mr. Evans, will you take the picture which is Photograph 2 of Exhibit D and count the objects shown on that picture that could represent either a box top or box bottom?

A. It's pretty hard to do with this coloring—background, with the type of eyes I have. I have very poor eyes and—(Short pause.) The picture doesn't clarify that I could make an exact count. There's cartons there in the dark background that

(Testimony of Edwin E. Evans.)

I couldn't distinguish exactly the boxes in this picture from rock.

Q. I asked you to see if you could count the total number of objects that might be box tops or bottoms and your answer, sir, that you are not able to do it from that photograph?

A. That is right, sir. I can determine a few, here. I can see about 9 that I know are box tops. There are other objects here that I wouldn't be certain of.

Q. You could see 8 or possibly 9 and that is the maximum, isn't it? A. That is right.

Q. Mr. Evans, who was in charge of the Big Mountain airstrip, if you know?

A. Who was in charge?

Q. Yes, sir. [188]

A. There was nobody outside of just myself and I had no authority over the airstrip, the fact that I was only building it under construction for Morrison-Knudsen Company; subcontractors was Western Electric.

Q. With whom was Western Electric contracting? A. Air Force.

Q. It was an Air Force strip ultimately?

A. It was to be an Air Force strip.

Q. Who established the wind socks, the wind indicators at either end of the runway of that strip?

A. I recall George Ammon, the first aid man, put the wind sock up.

Q. And at whose direction did George Ammon do that?

(Testimony of Edwin E. Evans.)

A. Through Mr. Haley and myself.

Q. Now, did any official of the U. S. Air Force, such as an officer, later change the location of those wind socks? A. Yes.

Q. He was an Air Force Colonel, was he not?

A. I couldn't say who done it. It was done after I left the site, sir.

Q. Oh, was it done afterwards?

A. Yes. I returned to Big Mountain last summer and the wind socks had been changed.

Q. Weren't they changed, Mr. Evans, while you were there? A. No, sir. [189]

Q. I see. Did you know that Colonel of the Air Force exercised direct control over that airstrip insofar as airplanes using it were concerned?

A. I did not.

Q. Now at the time you were constructing this road—and where was your office located, Mr. Evans?

A. Down at the base camp, right on the shore of Lake Iliamna.

Q. You were constructing a road at the time of this accident, weren't you?

A. That's right.

Q. And where was the road—where was it headed?

A. It was headed up to the permanent site.

Q. And was that at the top of Big Mountain?

A. That's right.

Q. That, I believe you said, was an electrical or high frequency installation?

(Testimony of Edwin E. Evans.)

A. Some micro-wave system, yes.

Q. Did you know at the time exactly what the nature of the installation was, or was it confidential or hush-hush?

A. I would say that I didn't know exactly what it consisted of. I know that it was a micro-wave system but I didn't know what it consisted of. In fact, we hadn't even seen the building plans. [190]

Q. Was it a part of the Distant Early Warning network that was being constructed on the White Alice?

A. Continuance of the Dew Line, yes, which was known as the Early Warning System.

Mr. Nesbett: Your Honor, it's practically noon. I wonder——

The Court: Well, I want to finish with this witness before we recess.

Mr. Nesbett: I see.

The Court: Well, I suppose we could take our recess now and come back at 1:30. I'd like to push this case along a little bit. Now, may I inquire how many more witnesses you have?

Mr. Talbot: No more.

The Court: This is your last witness?

Mr. Talbot: Yes, your Honor.

The Court: And assuming that this is the last witness of the Defendant, how many witnesses do you have?

Mr. Nesbett: Your Honor, there's so many ramifications of the defenses it would be difficult to say. I'd say maybe 3. I've got to check.

(Testimony of Edwin E. Evans.)

The Court: I think we better come back at 1:30. Ladies and gentlemen of the jury, we are about to take another recess. Again it is my duty to admonish you you are not to discuss this case with anyone. You are not allowed to have [191] anyone discuss it with you. We are going to recess until 1:30. Is there any member on the jury now that doesn't understand that? Does any member of the jury think they are coming back at 2:00 o'clock? You all remember, now, that you are coming back here at 1:30. All right, court will stand in recess until 1:30.

(At 1:30 o'clock p.m., June 3, 1958, counsel for plaintiff being present and counsel for defendant being present, the trial of said cause was resumed:)

The Court: Is it stipulated that the jurors are present in the box, the jury is present in the box?

Mr. Talbot: Yes

Mr. Nesbett: Yes

The Court: You may proceed.

Mr. Nesbett: May I see the Defendants Exhibit M?

Deputy Clerk: You have it, your Honor.

The Court: Here.

Q. (By Mr. Nesbett): I hand you, Mr. Evans, Defendants Exhibit M which appears to be a fragment of a manifest. Is that document you said was recovered by Mr. Ammon near the scene of the wreckage of the airplane?

(Testimony of Edwin E. Evans.)

A. As I see it, it is, yes.

Q. Did Mr. Ammon himself pick it up? [192]

A. As I recall it he did, yes.

Q. As you recall it. Well, do you recall the scene and the incident and your first sight of that document? A. Yes I do.

Q. Approximately how far from the wreckage of the fusilage of the airplane would you say this document was found?

A. I would say approximately 5 feet, maybe 6 feet.

Q. Was the document—did you see Mr. Ammon pick it up? A. Yes I did.

Q. Was the document lying on the ground at the time he picked it up?

A. I couldn't say to that. I seen Mr. Ammon stoop over and pick up the fragments or pick up the pieces of something and then that's when he called me over and showed then to me.

Q. The exhibit M was in a number of pieces, was it not? A. That's is right. It was, sir.

Q. And Mr. Ammon picked up all the pieces he could find, wasn't that correct?

A. Yes, sir, I believe so.

Q. And did he give those pieces to you, Mr. Evans? A. No, sir. He did not.

Q. What did he do with them?

A. He kept them on himself. I can't recall just what type of container he put them in, and held them and showed them to the CAA [193] investigators.

(Testimony of Edwin E. Evans.)

Q. Well now, when did he show them to the CAA investigators?

A. Well, if I recall right it was down at the office in the lower base camp.

Q. Were you present when he showed them to the CAA investigators?

A. I wasn't present when he showed them, sir. I was present shortly after when they were talking about them and they had them spread out in the office.

Q. The CAA investigator had that document that you have before you spread out in your office?

A. That's right.

Q. Are you sure of that? A. Yes, sir.

Q. As a matter of fact, don't you know that Exhibit M was forwarded to the CAA approximately —pardon me—forwarded to the main office of Morrison-Knudsen approximately 10 days after the accident?

A. That could have been, sir.

Q. It could have been? It was the fact, wasn't it? A. Not to my knowledge.

Q. That document was not given to Mr. Clark of the CAA when he visited the scene and made an investigation, was it?

A. To my knowledge it was.

Q. Do you know that Mr. Ammon kept that in his possession [194] until it was given to a CAA or CAB official? A. I do not.

Q. Well, you were job site superintendent, were you not? A. That's right.

(Testimony of Edwin E. Evans.)

Q. Mr. Ammon was first aid man, was he not?

A. That's right.

Q. Were his other duties to be catskinner?

A. No, sir.

Q. What were his other duties?

A. His duties were strictly first aid work and reports on the activity of the safety measures of the camp.

Q. Well, didn't Mr. Ammon also run a Caterpillar? A. No, sir.

Q. Now, was Ammon—part of Ammon's duties to preserve documents in situations such as that or was it your duty as camp site superintendent?

A. Well, I would say that it was Mr. Ammon's responsibility, being the first aid man and the man that talked to the CAA people more than I did.

Q. You did talk with him didn't you?

A. Some.

Q. You talked with Mr. Clark, who was investigating the accident? A. Very little.

Q. And you talked with Mr. Rogers who was there, did you not? [195]

A. I believe I did, yes.

Q. You talked with Mr. Mauer, the chief pilot of Cordova Airlines, did you not?

A. Very little.

Q. And you have seen him here in the courtroom, haven't you? A. I have.

Q. And you had conversations with Mr. Clark? On at least 2 different occasions during the time

(Testimony of Edwin E. Evans.)

he was there in the presence of Mr. Mauer, did you not?

A. Conversation—I would say I had it with him once. I can't recall the second time. I can't quite distinguish the people apart in the group that was there.

Q. Now, do you recall the conversation with Mr. Clark when Mr. Mauer was present, Mr. Clark being the CAA investigator? Do you recall the conversation with him when Mr. Mauer was present in which Mr. Clark asked you, "Do you know how many cases of dynamite were on that airplane?" To which question you answered, "I don't know"?

A. Not to my recollection; no, sir.

Q. Could the conversation have occurred and you not recall it? A. I don't believe so.

Q. You don't. You say not to your recollection, but you [196] weren't certain that it didn't occur, were you?

A. Well, I'm pretty certain, sir. I don't believe it did.

Q. You had conversations with Clark in Mr. Mauer's presence, didn't you?

A. As I recall, the only conversation I had with those people to speak of at all was while Mr. Mauer and the gentlemen concerned of the CAA—we were on our way to the lower base camp for lunch and the conversation was carried on more between Mr. Mauer and the CAA group than it was concerning myself in any way.

Q. Don't you recall in that conversation prior

(Testimony of Edwin E. Evans.)

to lunch Mr. Clark saying to you, camp site superintendent, "Do you know how many boxes of dynamite Haley had aboard"?

Mr. Talbot: Objected to as having been asked and answered.

The Court: Overruled.

A. As I say, I don't recall. I don't recall the question.

Q. What authority did Mr. Ammon have around that Big Mountain campsite, other than being first aid man?

A. That was his authority only. He was just strictly a first aid man and as I say, kept records and he had to make a report to his superiors here in town, which is a department of its own, on the safety measures and any accidents that took place on the site.

Q. And of course treat any injuries that might come to his [197] attention?

A. That is right, sir.

Q. Did he have any administrative functions other than that, or responsibilities?

A. No, sir.

Q. You knew Mr. Ammon had these fragments of that document at the time Mr. Clark was there, didn't you?

A. To my knowledge he did, yes.

Q. Did you tell Mr. Clark that Mr. Ammon had those fragments? A. I did not.

Q. Did you tell Mr. Mauer, the chief pilot for Cordova Airlines? A. I did not.

(Testimony of Edwin E. Evans.)

Mr. Nesbett: I believe that is all, your Honor.

Mr. Talbot: Mr. Evans, suppose that one of your own men had been killed in an accident, who would have been the person to take charge of the personal effects?

A. That would have been the first aid man.

Mr. Talbot: No further questions.

The Court: May this witness be excused?

Mr. Talbot: Yes he may, as far as we are concerned, your Honor.

Mr. Nesbett: Yes, your Honor.

The Court: You may be excused.

(Thereupon, the witness retired [198] from the stand.)

The Court: Call your next witness.

Mr. Talbot I have no other witnesses, your Honor. I have still the problem of Mr. Smith's deposition, and——

The Court: Well, it seems to me although the authorities you have given me indicate that it could be used, it seems to me Mr. Smith is here, you can put him on the stand and ask him exactly the questions that are in the deposition and then the jury would have a chance to evaluate the testimony of Mr. Smith by observing the way he answered the questions and his demeanor upon the stand and so forth and so on. I think it would be a better procedure than try and read from the deposition, so I will sustain the objection and let you call Mr. Smith and ask him those questions.

Mr. Talbot: Very well. If you will take the stand again, Mr. Smith.

The Court: Then if Mr. Smith doesn't answer the questions the same way you can read the answers to show that he is impeached.

Mr. Talbot: That's what I didn't want to do with Mr. Smith. I don't think he can be impeached, your Honor.

The Court: All right.

MERLE K. SMITH

resumes the witness stand and testifies as [199] follows on

Recross-Examination

By Mr. Talbot:

Q. I ask you this question, Mr. Smith: Now, concerning movements of that aircraft——

Mr. Nesbett: Now, your Honor, I would ask the page number?

Mr. Talbot: Oh, yes, this question is on page 4.

Q. Now, concerning movements of that aircraft during the period that it was chartered to Morrison-Knudsen, what control if any did Cordova Airlines have over the question of where the aircraft went and what work it performed?

A. I believe my answer to that was that we had no control over; MK had charge of the aircraft as to its movements.

Q. Would you say that your control was through the pilot? A. Yes.

Q. And the pilot was paid by you?

A. Yes.

(Testimony of Merle K. Smith.)

Q. And he was your employee?

A. Yes.

Q. Had any change or modification been made in the gas tanks or the gas carrying capacity of this plane since it came from the factory?

Mr. Nesbett: Your Honor, I'd like to know the page number.

Mr. Talbot: I'm sorry, Mr. Nesbett; page 20.

Mr. Nesbett: And further I object to reading the [200] question and asking the witness to answer it again. If he wants to use the deposition I suggest the witness be at least permitted to see his previous answer.

The Court: No, he's not being asked—questioned on the ground of impeachment at all. If it was impeachment he would be entitled to see the deposition and read his answer, but I'm requiring the counsel to put the questions that were put to him, rather than read the deposition. Objection overruled.

Mr. Nesbett: Page?

Mr. Talbot: Page 20, about two-thirds of the way down. May I have the question read back, please?

The Court: Well, you've got the question there. Start all over again.

Mr. Talbot: All right.

Q. (By Mr. Talbot): "Question: Now, had any change or modification been made in the gas tanks or the gas carrying capacity of this plane since it came from the factory?"

(Testimony of Merle K. Smith.)

A. No.

Q. No additional gas tanks had been added?

A. No.

Q. None had been taken out? A. No.

Mr. Talbot: No further [201] questions.

MERLE K. SMITH

testifies as follows on:

Further Redirect Examination

By Mr. Nesbett:

Q. Mr. Smith, did Cordova Airlines have any way of knowing what flight activities Haley, the pilot, was engaged in from day to day over in the Iliamna area? A. No.

Q. What instructions, if any, were given to Haley when he went out on this job with respect to flying this airplane for MK?

A. He was told to place himself at the disposal of the superintendents and whoever was in charge of MK operations in the Iliamna area, and to do as they requested.

Mr. Nesbett: No further questions.

The Court: You may step down.

(Thereupon, the witness retired from the stand.)

Mr. Talbot: Your Honor, there are various exhibits in evidence which I would like to read portions of to the jury before——

The Court: Why can't you read the exhibits after the argument rather than read them now?

Mr. Talbot: I would rather do it that way.

The Court: I see no objection to reading [202] the exhibits in the argument rather than——

Mr. Talbot: I don't either, your Honor, but I didn't want to be foreclosed.

The Court: No, I will allow you to read from the exhibits in the argument.

Mr. Talbot: Thank you.

The Court: I think you have a right to.

Mr. Talbot: The defense rests, your Honor.

Mr. Nesbett: We will call Mr. Mauer.

GRAHAM MAUER

called as a witness in rebuttal for and on behalf of the Plaintiffs and being first duly sworn testifies as follows on:

Direct Examination

By Mr. Nesbett:

Q. What is your full name, Mr. Mauer?

A. Graham Mauer.

Q. By whom are you employed?

A. By Cordova Airlines.

Q. How long have you been employed by Cordova Airlines? A. 6 years.

Q. Are you a pilot? A. Yes, I am.

Q. Have you been a pilot during the entire 6 years of your employment with Cordova?

A. Yes, sir. [203]

Q. How long have you been a pilot, Mr. Mauer?

(Testimony of Graham Mauer.)

A. I started flying in 1937.

Q. And have you been a flyer ever since 1937?

A. With the exception of one year teaching school.

Q. Now, what capacity did you have with Cordova Airlines in December of 1955?

A. I was the chief pilot for Cordova.

Q. And as chief pilot, generally speaking, what were your responsibilities?

A. Well, my responsibilities were to hire pilots, check them out and see that they were qualified to do the job that would be asked of them.

Q. Calling your attention to the dates of December 18 and 19 of 1955, I will ask you whether or not you had occasion to investigate the scene of an accident on behalf of your company?

A. Yes; I did.

Q. Where was that accident and who was the pilot?

A. The accident occurred on the south slope of Big Mountain on the south shore of Iliamna Lake, and the pilot was Herbert Haley.

Q. Mr. Mauer, on what day did you first visit the scene of that accident?

A. We arrived at the scene of the accident at 10:30 on the morning of the 19th. [204]

Q. And would that be the morning of the day after the accident? A. Yes, sir.

Q. To the best of your knowledge?

A. To the best of my knowledge.

(Testimony of Graham Mauer.)

Q. Now, why did you go to the scene of the accident?

A. Primarily I wanted to see what the cause of the accident was to protect the company in anything that might come up and also to remove Mr. Haley's body and bring it into Anchorage.

Q. Did you investigate the scene of the accident, the airplane and the area surrounding or adjacent to the wreckage? A. Yes, sir, I did.

Q. Were you able to determine from your investigation the reason for the accident?

A. No, sir.

Q. And did you meet a Mr. Evans when you were there at the scene of the accident?

A. Yes, sir, I did.

Q. Did you meet a Mr. Clark from the Civil Aeronautics Board? A. Yes, sir.

Q. Did you meet a Mr. Rogers of the CAA?

A. Yes, sir. [205]

Q. Mr. Mauer, I will show you Photograph No. 2 of Defendants Exhibit No. D and ask you if you can recognize the scene in that photograph?

A. Yes, sir, I do.

Q. And what is it?

A. It shows the wreckage of the 180 on the south side of the mountain with the shore of Lake Iliamna, the south shore, in view of the distance there.

Q. Do you know who took the picture?

A. No, sir, I do not.

Q. Were you there when the picture was taken?

A. There was numerous photographs taken when

(Testimony of Graham Mauer.)

I was there. I couldn't say whether this one was taken at that time.

Q. Now, Mr. Mauer, did you know that Pilot Haley was carrying dynamite for Morrison-Knudsen in the Iliamna area prior to the accident?

A. No, sir, I did not.

Q. Did you ascertain or learn that fact after you went to the scene of the accident?

A. I learned it at the time of the accident, shortly after the accident when the report came into Anchorage.

Q. Did you have occasion to observe the remains of dynamite cartons in the area of the scene of the wreckage? A. Yes, sir.

Q. And do you recognize the carton such as this carton [206] sitting on the table? A. Yes, sir.

Q. Do you recognize it as representative of the cartons that appeared near the scene of the wreckage?

A. It appears similar in shape. The condition of those at the wreckage were in such badly beat up condition that it would be pretty hard to say that those in the aircraft were in exactly the same size as that one.

Q. Generally speaking, looking at that carton would you say that it is representative of the cartons that were carried by Haley at the time of the plane crash?

A. Yes, sir, I believe I would.

Q. Now, during the course of your investigation there at the scene of the accident did you attempt

(Testimony of Graham Mauer.)

to determine how many cartons of dynamite Haley had on board the plane when it crashed?

A. Yes, sir, we did.

Q. And as a result of that effort, investigative effort, did you arrive at any conclusion?

A. As near as we could figure, myself and the CAA members who were there, taking into account all the number of pieces and the various condition that they were in we arrived at the figure of 8 cases of dynamite that could have been aboard.

Q. Now, what was generally—describe for the court and [207] jury what was generally the condition of the cartons in the area of the scene of the wreckage?

A. Well, to the best of my knowledge, there was not one single intact carton in the entire area. Every carton there was torn, split, broken in numerous pieces.

Q. Did you attempt to determine from a count of the reasonably intact cartons in the area how many were aboard? A. Yes, we did.

Q. Is that how you arrived at your figure of 8?

A. Yes, sir.

Q. Was Mr. Clark attempting to do that at the time you were there? A. Yes, sir.

Q. Did Mr. Evans take any part in that activity?

A. No, sir, I don't believe he did.

Q. Now, can you state for the benefit of the court and jury the approximate distance over which these dynamite carton fragments were scattered?

(Testimony of Graham Mauer.)

A. To the best of my knowledge, from about 50 foot beyond the initial impact of the aircraft there was dynamite scattered from that point, 50 foot from the initial impact to 50 to 75 foot beyond the aircraft after it came to rest and 75 feet to 100 feet either side of the path that the aircraft made sliding down the mountain. [208]

Q. Now, then, will you state if you can the approximate distance between the point of initial contact of the airplane with the earth and the point at which it came to rest?

A. We measured that; exactly 300 feet.

Q. Then is it your testimony that dynamite cartons were scattered from the point of initial contact to the resting place of the fusilage and up to 75 feet beyond?

A. No, sir. I don't believe I said that.

Q. State again the distance in feet that these cartons were scattered over.

A. The aircraft hit 50 feet after it hit. There was a—there's slide marks and 50 foot from the initial point of contact that's where the dynamite started, and then for 75 foot beyond that or beyond the point where the wreckage came to rest. In other words, the dynamite was scattered from 250 feet behind where the aircraft rested to 75 feet beyond where the aircraft rested.

Q. Do you recall a conversation with Mr. Clark of the CAB in the presence of Mr. Evans during which conversation Mr. Clark asked Mr. Evans if

(Testimony of Graham Mauer.)

he knew how many cartons of dynamite were on that plane at the time it crashed?

A. Yes, sir, I do.

Q. What did Mr. Evans say in response to Mr. Clark's question? [209]

A. I believe Mr. Evans says, "I don't know."

Q. I show you Defendants Exhibit M to observe. You have seen that before, haven't you, Mr. Mauer?

A. Yes, sir.

Q. And did you see that exhibit at Big Mountain at the time you were there investigating the cause of the crash?

A. No, sir, I did not. I would have liked to.

Q. Did you know that it existed?

A. I did not.

Q. Mr. Mauer, during the time you were at the scene of the accident, did you attempt to determine how many gallons of gasoline Mr. Haley might have had upon board of his airplane at the time it crashed?

A. Yes, I did but I could see no reason how I could determine it.

Q. Well, were you able to come to any conclusion? A. No, sir.

Mr. Talbot: Object, your Honor.

The Court: Overruled; he says no.

Mr. Nesbett: I'd like to see the exhibit which is the flight log of the airplane of December 17th.

The Court: On the 17th?

Mr. Nesbett: Yes.

Deputy Clerk: "L."

(Testimony of Graham Mauer.)

The Court: Here it is. Has that been [210] admitted into evidence?

Deputy Clerk: For identification only.

Mr. Talbot: That's—I believe that is the wrong exhibit.

Mr. Nesbett: That is the wrong exhibit. The aircraft log.

Mr. Talbot: "K."

Deputy Clerk: Here it is.

Q. (By Mr. Nesbett): Mr. Mauer, here is Exhibit K which is the aircraft log of December 17, 1955. Can you, Mr. Mauer, examine that exhibit and determine from the notations on it how many gallons of gasoline Mr. Haley had on that airplane on the morning of the 18th or approximately at the time of the crash?

A. No, sir, not from this form I cannot do it.

Q. Mr. Mauer, that form indicates on the left-hand portion as the bottom entry a figure. I believe it's 35, is it not? A. Yes, sir.

Q. In the ordinary course of Cordova Airlines business what would that indicate?

A. Well, it would probably indicate gasoline added sometime during the day.

Q. Now, could you say, according to company routine, that [211] it was gasoline added at the end of the day or during the period of day or at any time?

A. It could have been added first thing in the morning. I mean it could have been added any

(Testimony of Graham Mauer.)

time during the day or possibly even the night before.

Q. Now, as chief pilot of Cordova Airlines, can you say that in looking at a form such as that with those figures on it that Herbert Haley had 55 gallons of gasoline on board his airplane when he commenced operations on the morning of the 18th of December, for example?

A. No, sir, I cannot tell that from this form.

Q. Now, in your duties with Cordova Airlines you have had occasion to fly the bush in almost every area of Alaska, haven't you?

A. Yes, sir.

Q. And in most types of modern bush airplanes, is that correct? A. Yes, sir.

Q. Mr. Mauer, do you know who owned that airstrip at Big Mountain?

A. The United States Air Force.

Q. Were you able to determine from your investigation the reason why Herb Haley crashed into the mountain there?

Mr. Talbot: Object as having been asked and answered, your Honor. [212]

The Court: Read the question.

(Thereupon, the reporter read Question, Line 22, Page 212.)

The Court: Sustained. He said a little while ago he couldn't.

Q. (By Mr. Nesbett): Did he crash into the side of the mountain? A. Yes, he did.

(Testimony of Graham Mauer.)

Q. Mr. Mauer——

A. Mr. Nesbett, may I make a correction? I apparently misunderstood your former question. You asked me if I knew exactly what caused the airplane to crash and I said no, I did not exactly.

Q. I understand all right. Now, in your duties with Cordova Airlines have you had occasion to fly Cessna 180 airplanes?

A. Yes, numerous times.

Q. Do you know approximately the number of hours you have had in the air in that type airplane?

A. It's in the neighborhood of 300.

Q. As a result of your investigation there at Big Mountain did you develop or arrive at a theory of the reason for the crash of Herb Haley's airplane?

Mr. Talbot: Objection, your Honor.

The Court: Just a minute. Counsel has the [213] right to finish his questions.

Mr. Talbot: I'm sorry, your Honor.

The Court: And did you get the entire question?

(Thereupon, the reporter read back Question, Line 21, Page 213.)

The Court: Objection?

Mr. Talbot: I do, yes, sir.

The Court: Well, I think the objection is good.

Mr. Nesbett: I thought I qualified the man as an experienced bush pilot and having 300 hours.

The Court: Well, it may be true that he's an experienced bush pilot—he may have a lot of experience but I don't know whether anybody can go

(Testimony of Graham Mauer.)

out and look at a plane and then come to some conclusion as to why it crashed. There's a thousand reasons can cause a plane to crash.

Mr. Nesbett: That's certainly true, your Honor, that's certainly true. All we can do is the best we can under the circumstances. We've not got Haley here. I'm just trying to offer the best I can from a witness.

The Court: Well, you're done your duty. I'll do mine. Objection sustained.

Mr. Nesbett: I believe that is all, your Honor.

GRAHAM MAUER

testifies as follows on: [214]

Cross-Examination

By Mr. Talbot:

Q. Mr. Mauer, as I understand your testimony you, as chief pilot for Cordova Airlines, went down on the 19th of December at Big Mountain to represent the company and to protect the company, right?

A. Not entirely. That was one of the reasons for going down.

Q. Now, to whom did you give your written report of your investigation?

A. It was turned over to Mr. Smith of Cordova Airlines who in turn submitted it to the Civil Aeronautics Board.

Q. I would, your Honor, call upon Mr. Nesbett to produce that written report which was submitted

(Testimony of Graham Mauer.)

by this man to his company as a result of this trip. I realize it's very short notice but I'd no idea there was such a document until just now.

The Court: Well, you could have obtained the information by discovery proceedings and you could have probably obtained copies of the report.

Mr. Nesbett: We spent hours, your Honor, trying to get what he wanted; that wasn't among the requests.

The Court: Do you have the report with you?

Mr. Nesbett: I have not, your Honor, no, sir.

Q. (By Mr. Talbot): Now, I take it that you observed carefully the scene of this crash, Mr. [215] Mauer?

A. I spent approximately 5 hours at the scene.

Q. Going over the ground? A. Yes, sir.

Q. You have testified, I believe, as to skid marks that this airplane made when it hit the ground first and then——

A. Nobody asked me about skid marks, but there were impact and skid marks, yes, sir.

Q. Now, isn't it true that part of the impact marks consisted of deep gouges in the terrain made at right angles to the path of the aircraft such as would have been made by the propeller of the aircraft?

A. That's part of the skid marks, yes, sir.

Q. And you observed propeller marks?

A. I did.

Q. By observing those propeller marks and the

(Testimony of Graham Mauer.)

depth of them you could tell, could you not, that the plane was under power when it crashed?

A. No, sir, you could not. The ground was frozen extremely hard and extremely rocky.

Q. Hard and rocky ground? A. Yes, sir.

Q. Would a propeller that was still in the air or that was only windmilling have made the depressions and gouges that you observed, sir? [216]

A. Possibly it could have. At half power possibly it would have.

Q. Half power?

A. That's right. It doesn't necessarily have to be—you stated that the aircraft was under considerable power. The marks could have been made by an aircraft with the engine only at 50 per cent power.

Q. Very well. Now you have been present—you were present in court when Mr. Evans testified, were you not? A. Yes, sir.

Q. You heard his testimony? A. Yes.

Q. You realize that your testimony about 8 cases of dynamite is in sharp conflict with his testimony of 16 cases? A. I do.

Q. Now, is it your testimony that George Clark, the CAB investigator, agreed with you on the scene that there were 8 cases of dynamite?

A. He did not agree with me. I didn't state that.

Q. I must have been mistaken. Now, did you make a careful examination of this wreck and the surrounding area to ascertain other items which

(Testimony of Graham Mauer.)

may or may not have been laden on board this aircraft? A. Yes, I did.

Q. And what other items did you see or find as a result of [217] this careful examination?

A. There was no personal items as mentioned by Mr. Evans. Apparently those had all been removed when we got there. I retract that statement —the gun that Mr. Evans stated was there in a damaged condition and there was the 2 skis lying around the 2 broken off skis. One of the landing gear, one of the wheels, the engine was laying there. One blade of the prop was considerable distance from the aircraft and one of the seats was out of the aircraft. The pilot's seat was out of the aircraft and numerous bits of upholstery and various parts of the aircraft itself was scattered over a wide area.

Q. Was there any cargo remaining in the aircraft? A. Yes, there was.

Q. And what did that consist of?

A. There was a partial box of dynamite. When I say a partial box, there was a partial carton with several broken pieces of dynamite in the aircraft and it was in a charred condition.

Q. Was there anything else in the aircraft in the way of cargo or possible cargo?

A. No, sir.

Q. And you are quite certain that 8 cases of dynamite is all that was reflected by the fragments of the boxes as far as—— [218]

A. As near as I could reconstruct, yes, sir.

(Testimony of Graham Mauer.)

Mr. Talbot: May I have Exhibit M, please?

The Court: This is M here.

Q. Now, this is a disturbing problem, Mr. Mauer. Now we have some testimony in this case that—in fact I think it's all approximately stipulated—anyway, there is testimony that these cases of dynamite weighed 53 pounds each. Now taking your figure of 8 cases and multiplying it by 53 I get a total of 424 pounds. But we have on Exhibit M, the flight report for the 18th, under "Pounds Freight," an entry apparently made by the pilot—not 424 pounds, but 870 pounds.

Mr. Nesbett: I will object to——

Mr. Talbot: I haven't finished my question, your Honor.

The Court: I think he's entitled to finish the question.

Q. (By Mr. Talbot): Now——

The Court: Just a minute. Will you start all over again?

Mr. Talbot: Yes, your Honor.

Q. Mr. Mauer, according to my calculations 8 cases of dynamite weighed 424 pounds but we have some evidence here which possibly indicates that the pilot was [219] carrying 870 pounds instead of 424. Now does looking at this document or thinking about that other evidence, does that change your testimony in any way?

A. No; other than that can be interpreted 2 ways if you will look at it very carefully.

(Testimony of Graham Mauer.)

Q. Well, I suppose that will be a matter for the jury, your Honor.

The Court: Well, I'd like to know how it can be interpreted another way.

Q. Yes, I would, too.

A. In looking this over very carefully, he states that there is 870 pounds. By looking at it, it looks like 570 pounds. I mean it could be interpreted, and I think——

The Court: You mean to say that——

A. Look at that, sir. (The exhibit was handed to the Court.)

The Court: You mean to say that this could be read "570" or "870" pounds?

A. It could be read either way, yes, sir.

Q. (By Mr. Talbot): Now, Mr. Mauer, do you have before you the other exhibit which is the log for the 17th?

A. Yes, sir, I do. That is Exhibit K?

Q. Yes. A. Yes. [220]

Q. Now, do you see the entry called "Total Fuel on Board" at the top of the page?

A. I see a column that says "Total Aboard," yes.

Q. "Total Aboard." That's under "Fuel," isn't it? A. Yes, under a sub-title.

Q. And the number is 55?

A. That is written above the column heading.

Q. That is within the column, isn't it, under "Total Aboard"?

A. No, sir; it's written above.

(Testimony of Graham Mauer.)

Q. Well, I'm sorry. I've got a copy and you have got the original. I apologize. May I see that? (Short pause.) You are absolutely right.

The Court: May I have that other exhibit?

A. This one, sir? (The exhibit was handed to the Court.)

Q. (By Mr. Talbot): Anyway, we can agree it's in the column called "Total Aboard" or above it?

A. It's above the column "Total Aboard," yes, sir.

Q. Now down below that in the other column called the "Amount Added," is there a figure?

A. Yes, sir.

Q. And what's that?

A. It says "35" here.

Q. And now assuming, Mr. Mauer, that the 55 means total aboard at the beginning of the day it's true, is it not, [221] that the pilot would have to burn 35 gallons before he could put 35 more in?

A. If that were the total aboard at the beginning of the day and flew so much time there, he would have to fly so much time before he could add 35 gallons, that is true.

Q. Now, how many hours and minutes does that log show he flew on the 17th?

A. This shows 2 hours and 50 minutes.

Q. You're an experienced Cessna pilot, sir? Cessna 180? Could you tell us approximately how much a Cessna 180 with a pilot, no passengers,

(Testimony of Graham Mauer.)

and no freight—how much it burns an hour, gasoline under normal operating conditions?

A. 12 gallons an hour.

Q. How about fully loaded? That is, gross loaded but not overloaded?

A. Under normal operation he would not burn any more than 12 gallons per hour.

Mr. Talbot: No further questions.

GRAHAM MAUER

testifies as follows on:

Redirect Examination

By Mr. Nesbett:

Q. Mr. Mauer—— [222]

The Court: Before you continue, you might want to ask some questions. I am going to make a ruling. I have refused to allow Exhibit H in evidence. That is the flight reports of days previous to the day in which the plane was destroyed. I am going to change my ruling and allow it to be introduced in evidence for a limited purpose only, and I am going to do that because the testimony of the Plaintiff's witness. Plaintiff testified that the—on Exhibit M which is in evidence there is a figure that could be read either 870 or 570. I am going to allow Exhibit H to be introduced into evidence so that the jury can have a chance to compare the figure 8 and the figure 5 in Exhibit H with the figure 8 or the figure 5 in Exhibit M. Now I might

(Testimony of Graham Mauer.)

say, ladies and gentlemen of the jury, that this exhibit is only admitted for this limited purpose and I am admitting it because the testimony of this witness is that he could read it 2 ways and I agree with him. I agree it could be read either 870 or 570, and I think that in order to determine whether or not it's 870 or 570 you should have a chance to compare the figure 8 and the figure 5 in the other reports that were made relative to the flight of the Cordova Airlines by Pilot Haley. So it may be admitted only for that limited purpose.

Mr. Talbot: Thank you, your Honor. I have no further questions. [223]

GRAHAM MAUER

testifies as follows on:

Further Redirect Examination

By Mr. Nesbett:

Q. Mr. Mauer, did you disagree with Mr. Clark as to the number of cases of dynamite on board?

A. No; I did not disagree with him.

Q. You testified I believe on cross that you did not—you testified that you had agreed with him. Will you explain your answer?

A. My answer to that is Mr. Clark came up and asked me how many cases I figured he had on board and I said, "Well, as near as I can figure from what we have seen here is around 8 cases," and I asked him what he thought and he says,

(Testimony of Graham Mauer.)

"Well, now, that's my thinking, too." So I did not disagree with him.

Q. Then did you go over the scene in the area of the accident with Mr. Clark or were you there when he went over?

A. I was there. I mean we did not work side by side, Mr. Nesbett. He was going over the area, I was going over the area, Mr. Rogers was there and Mr. Tibbs. We were all going over the area at the same time and when we would run into something interesting, for instance the engine, why we would all congregate around and take a look at the engine and discuss it. [224]

Q. Now, Mr. Mauer, as a result of your investigation at the scene and knowledge later obtained, do you know whether or not one front seat and the two rear seats of that airplane were in the airplane at the time it crashed?

A. I did not see them in the aircraft. And we did bring the hammock seat—in other words, the hammock seat and the other front seat was at the camp. Now they were not in the aircraft when I saw the aircraft; neither was the pilot's seat. It was laying outside the aircraft.

Q. But I asked you about the seat in front other than the pilot's seat and the two rear seats. Is it a fact that those three seats were at the camp?

A. Not the three seats. The hammock seat and the other front seat was at the camp.

Q. Were at the camp? A. Yes.

Q. And Cordova Airlines did regain or have pos-

(Testimony of Graham Mauer.)

session of those, did they not? A. Yes.

Q. Were they damaged in any fashion?

A. No, sir.

Q. Did you have occasion during your investigation to observe the skis of that airplane or what was left of the skis of the airplane? [225]

A. Yes, sir, we looked those over very, very carefully.

Q. I'll ask you whether or not you observed whether there was a coating or covering of galvanized tin or metal over those skis when you saw them at the scene of the wreck?

A. No, sir, there was not.

Q. Were the skis so badly mangled that you wouldn't have been able to observe the tin if they had been on the skis prior to the crash?

A. No, sir. One ski was practically intact, the largest portion of the ski was practically intact. In other words, the full length of the ski. The other one was sort of rolled up in a ball but the entire bottom of the ski was there for both skis. And there was no indication of any steel on them, just the aluminum.

Mr. Nesbett: I believe that is all, your Honor.

Mr. Talbot: No questions.

The Court: Step down.

(Thereupon, the witness retired from the stand.)

Mr. Nesbett: Call Mr. Seltenreich.

BUD S. SELTENREICH

called as a witness in rebuttal for and on behalf of the Plaintiffs and being first duly sworn upon oath testifies as follows on [226]

Direct Examination

By Mr. Nesbett:

Q. Is your name Bud S. Seltenreich?

A. Yes.

Q. Are you employed by the Civil Aeronautics Authority? A. Yes.

Deputy Clerk: Mr. Nesbett, would you let him spell that name, please?

A. S-e-l-t-e-n-r-e-i-c-h.

Q. You are employed by Civil Aeronautics Authority in Anchorage, are you not?

A. Yes.

Q. What is your official position, Mr. Seltenreich?

A. Chief of the Air Carrier Safety Maintenance Branch.

Q. Mr. Seltenreich, did you have occasion to discuss with me in your office this morning Civil Air Regulation 49.3, sub (b)? A. Yes.

Q. I hand you a paper and ask you if that actually is your document that you gave to me this morning? A. Yes.

Q. Does that document set out Civil Air Regulation 49.3(b)? A. Yes.

Q. Has 49.3(b) been amended in any fashion and, if so, what were the dates?

(Testimony of Bud S. Seltenreich.)

A. I believe it has been, part of it has been amended, although I would have to study the amendment to determine [227] for sure if this particular section had been amended.

Q. Didn't you state this morning that there was an amendment that was in the same pamphlet you gave me?

A. Yes, but I wasn't certain whether it applied to this particular part, (b) of 49.3.

Q. Mr. Seltenreich, generally what does 49.3(b) concern?

Mr. Talbot: Objection. The regulation speaks for itself.

The Court: Well, if that is typical of a Government regulation somebody has to explain it because I have read Government regulations from time immemorial and I can't understand them. Overruled.

Q. Generally, what does that regulation concern itself with? The subject matter?

A. It pertains to the regulations for transportation of explosives and other dangerous articles by air.

Q. Does it particularly provide in connection with obtaining a shipper's certificate when explosives are received for shipment by an air carrier?

A. Section 49.3(b) of Civil Air Regulation, part 49 provides for the shipper to provide a certificate of what the shipment contains.

Q. Now, Mr. Seltenreich, I am not asking you to interpret the meaning of that regulation. I will

(Testimony of Bud S. Seltenreich.)

ask you as Safety Agent how—what practical steps the Civil Aeronautics Authority takes in Alaska to enforce that [228] regulation as to air carriers?

Mr. Talbot: Object, your Honor, I don't think any foundation has been laid that they have authority. I understand that this is a CAB regulation and I'm not up on exact interrelationships here, but——

The Court: Overruled. One of the questions here is whether or not they had to get a waiver and I think this is pertinent to that question.

A. Would you state the question?

Q. (By Mr. Nesbett): As a practical matter, what enforcement procedures were followed with respect to that section? Was it enforced? Were any enforcement steps set out?

A. In this particular case I don't know, because I had no dealings with this particular operation.

The Court: Well, that's not the question. The question was "generally," not this particular case, but as a general thing?

A. It's a little difficult to answer. We usually——

The Court: Well, now, if you don't know there's no disgrace in saying you don't know.

Q. Do you know?

The Court: We don't want you to guess and we don't want you to say "usually."

A. Well, no, I don't know. [229]

Q. Didn't you tell me that in your office this morning? A. That's right.

Mr. Nesbett: I believe that's all.

Mr. Talbot: No questions.

The Court: May this witness be excused?

Mr. Talbot: He may.

The Court: Do you want 49.3 in evidence?

Mr. Nesbett: Your Honor, it might be helpful. May I use that and put it in evidence and get a copy for you, sir?

A. Yes.

Deputy Clerk: Plaintiffs 2.

The Court: It may be received in evidence. Yes, that's Plaintiffs Exhibit 2. And when we are talking about documents, Mr. Nesbett, have you introduced the Civil Aeronautics Board S-712?

Mr. Talbot: Yes, your Honor.

Mr. Nesbett: Yes, your Honor, that is in evidence.

The Court: What is the number of that exhibit?

Mr. Nesbett: It's Plaintiffs Exhibit A.

Mr. Talbot: 1, I think.

Deputy Clerk: Plaintiffs 1.

Mr. Nesbett: Your Honor, actually that, of course, was offered at a pretrial conference, Mr. Talbot.

Deputy Clerk: That's right. [230]

Mr. Nesbett: Does your Honor recall?

The Court: Yes, it's been marked in this case though. I want to be sure it's in evidence.

Deputy Clerk: Wait a minute—Plaintiff's 1 is the face sheet.

Mr. Talbot: I am in error, your Honor. It's Defendants A.

The Court: Oh, Defendants A. And 49.3(b) is Plaintiffs. That is Exhibit 2.

Deputy Clerk: 2.

Mr. Talbot: Your Honor, I'm awfully close to resting. May we have a short recess?

The Court: Yes. Ladies and gentlemen of the jury, we are about to take another recess. Again it is my duty to admonish you you are not to discuss this case with anyone. You are not allowed to discuss it, let them discuss it with you, not until the rights of the parties are finally submitted to you for your decision.

May I inquire if you rest? Will you have any other testimony?

Mr. Talbot: No, your Honor.

The Court: Well, I want—if you are going to rest will you let me know, because I want to discuss instructions with you before the jury comes down?

Mr. Nesbett: Yes, your Honor. [231]

The Court: And if you have to have any more testimony we'll have to bring the jury down and get the testimony and excuse them again because there's some of the instructions that have to be clarified. Court will now stand in recess until 15 minutes to 3:00.

(Thereupon, at 2:45 o'clock p.m., June 3, 1958, court reconvenes following a 10-minute recess, the jury having resumed their places in the jury box, and the following proceedings were had:)

The Court: Is it stipulated the jury is in the box?

Mr. Nesbett: Yes.

The Court: You may proceed.

Mr. Nesbett: Your Honor, I want to call Mr. Smith.

MERLE K. SMITH

resumes the witness stand in rebuttal and testifies as follows on:

Direct Examination

By Mr. Nesbett:

Q. Mr. Smith, did Cordova Airlines make any application to the Civil Aeronautics Authority for any specific waiver to carry the dynamite that was on the airplane on December 18, 1955?

A. We did not. We didn't need—— [232]

The Court: Just a minute. The answer is you did not?

Mr. Nesbett: ——

The Court: Don't try to explain.

Q. Mr. Smith, will you state why you made no specific application for a waiver to Civil Aeronautics Administration?

Mr. Talbot: I object, your Honor, on the ground the regulation requirement for waiver is clear, and question of why they didn't do it is absolutely irrelevant.

The Court: Well, it's sustained unless you can show that the witness was told by somebody in authority they didn't have to make an application. Now if you have got that testimony I will over-

(Testimony of Merle K. Smith.)

rule the objection. Otherwise I am going to sustain it.

Q. (By Mr. Nesbett): Mr. Smith, were you advised by local officials of Civil Aeronautics Authority that you had blanket authority to carry explosives for the Air Force? A. I was.

Q. And by whom? A. Mr. Tibbs.

Q. And who is Mr. Tibbs?

A. He was our agent, CAA agent in charge of Cordova Airlines.

Q. And where was his office?

The Court: Just a minute. You mean to say one of [233] your employees told you that?

A. This was a CAA—the agent in charge of Cordova Airlines, who was a CAA man and he looks after all of our operations.

The Court: Then you were told by someone in your employ? You weren't told by a Governmental employee?

A. Yes, he was Government employee.

The Court: He had a dual capacity?

Mr. Nesbett: Mr. Smith, will you explain to the Court how that operates as to scheduled airlines and assignment of CAA officials?

A. The CAA sets up for scheduled airlines—they have an agent in charge who is usually a pilot and he is in charge of everything in regards to our relations with CAA. We deal with him on everything. Then they have another inspector, as we call them, who is the maintenance inspector who is in charge of all the maintenance. He deals with the

(Testimony of Merle K. Smith.)

Company as far as mechanics and maintenance of the aircraft.

Q. What relationship did Mr. Tibbs have with Cordova Airlines insofar as CAA was concerned?

A. He was the agent in charge, the one we dealt with.

Q. Now, was Mr. Tibbs paid by Cordova Airlines in any fashion? A. No, sir.

Q. Did Mr. Tibbs maintain his office at Cordova Airlines building or property? [234]

A. No, sir.

Q. Where did he maintain his office?

A. In the Terminal, at the International Airport at that time.

The Court: He was an employee of whom?

A. Civil Aeronautics Authority.

The Court: All right.

Q. Now, Mr. Smith, has Cordova Airlines been charged with any violations of the law or regulations as a result of this accident of December 18th?

A. No, sir. Not either by the CAA or CAB.

Mr. Nesbett: I believe that is all.

MERLE K. SMITH

testifies as follows on:

Cross-Examination

By Mr. Talbot:

Q. When did you make this inquiry to Mr. Tibbs?

A. Oh, I think that we had been talking about this regulation coming out for——

(Testimony of Merle K. Smith.)

The Court: May I ask you a question? Then you knew before the accident that your planes were carrying dynamite, is that right?

A. Not on this particular flight, I didn't know he was carrying dynamite on this flight.

The Court: Well, I know, but your planes had been [235] in the habit of carrying dynamite? Otherwise you wouldn't have discussed this problem, is that right?

A. Well, we assumed—our position was that the order come out December 2nd, give us a blanket authority.

The Court: Well, I know, but you did have some knowledge that your planes might or had been carrying dynamite?

A. It was—from my position, MK wanted to carry dynamite it would be all right because we were protected.

Q. (By Mr. Nesbett): Mr. Smith, how did you learn about the existence of this order of December 2, 1955? This order from CAB?

A. Our counsel in Washington, D. C. I believe he wired us and told us that there was an order coming out.

Q. And you had—Cordova Airlines had in the past carried dynamite all right, had it not?

A. Yes, sir.

Q. And for mining operations?

A. Yes; small amount.

Q. Mining operations on bush planes?

A. That's right.

(Testimony of Merle K. Smith.)

Q. Had you received any advice from Mr. Tibbs with respect to the legality of carrying dynamite in those operations?

A. We were, if it was under 60 per cent we'd treat it like we would gasoline or anything; you couldn't haul passengers.

Q. And who told you that? [236]

A. Well, Mr. Tibbs or his predecessor.

Q. Who was Mr. Tibbs' predecessor?

A. Offhand, I just can't recall his name.

Q. In any event, take the period for two months prior to December of 1955. Had Cordova Airlines had any occasion to carry any dynamite preceding that two months' period?

A. That I don't remember.

Q. If you—did you carry it on any of your large planes? Could you isolate it to that situation?

A. I don't think we did, no. No large loads.

Q. Did you know when Haley went to the Iliamna area that part of his duties would be to carry dynamite? A. I didn't know it, no.

The Court: Well, you knew that his duty was to carry anything Knudsen wanted him to carry?

A. That's right.

Q. Mr. Smith, where is Mr. Tibbs now?

A. He has been advanced in capacity with the CAA and he has moved down to the Federal Building, that's in the building here.

Q. His office is in this building now?

A. Yes.

(Testimony of Merle K. Smith.)

Q. And he is still working right in this building today?

A. I don't think so. I think he's on vacation or to a flight training school at Oklahoma City. [237]

Q. Well, do you know where he is?

A. Well, I don't exactly know.

Q. Now, is it your position that prior to the promulgation of this order No. S-712, that is the regulation that was made for the benefit of the Air Force, that prior to that order you were free to carry dynamite as long as you didn't carry it on a plane that also carried passengers at the same time?

A. I'm not familiar with that order number. Is that one dated December 2d?

Q. Yes, sir.

A. Well, yes. If it wasn't—if it was under 60 percent, was a Class B explosive.

Q. It was your understanding that anything under 60 percent was Class B and you could carry it as ordinary freight, is that right, as long as there were no passengers aboard?

A. That is right.

Q. To your knowledge, did Cordova Airlines ever apply to CAA for permission for a waiver on a particular flight for the carriage of explosives?

A. Yes.

Q. You did get waivers for particular flights?

A. Since the order of May—I believe it was in May—came out we have been getting waivers, May of 1956 I believe [238] it was.

(Testimony of Merle K. Smith.)

Q. Now, the order of May, in May 1956, that was the order that was secured by Morrison-Knudsen after this crash, isn't that right?

A. Well, I was told the Air Force.

Q. And that regulation in May of 1956 required you to get special permit for each flight, right?

A. Well, I don't know whether it required it, but we did it.

Q. You have been getting permits regularly for each flight, then?

A. Since last order come out, yes.

Q. How many of those special permits have you gotten?

A. I can't recall. There's been several.

Q. Do you have any of those special permits or waivers available to the Court?

A. They're pretty sure they're in our files.

Q. Where, in Cordova?

A. No. No, they're at the airport—International Airport.

Mr. Talbot: No further questions.

The Court: Any other questions?

Mr. Nesbett: I have no questions, your Honor. I was looking for Mr. Seltenreich.

The Court: You may step down.

(Thereupon, the witness retired from the stand.)

The Court: Any other testimony?

Mr. Nesbett: No, your Honor. Plaintiff [239] rests.

Mr. Talbot: Defense rests, your Honor.

The Court: Ladies and gentlemen of the jury, I want to discuss instructions with the counsel prior to the argument and I am going to ask you to return to the jury room until you have been called back into the court room. Will you kindly retire as quietly as possible.

(Thereupon the jury was excused and left the courtroom and the following proceedings were had:)

The Court: We will proceed with Plaintiffs proposed instructions first and will you kindly get out Plaintiffs proposed instructions. I have instruction No. 1 and I object to the last paragraph. That is found on page 2, and I propose to strike out the last paragraph. I don't think the question of due diligence has anything to do with this case at all. There's no evidence here that there was or was not due diligence. All we know is the plane crashed. So I am proposed to strike out the last paragraph on page 2 of the first instruction. I have no objection to Instruction No. 2. Does the Defendant have any objection?

Mr. Talbot: Yes, we have some more objections to 1.

The Court: All right, what have you to 1? I didn't want to foreclose you; I want you to have a chance to make your record.

Mr. Talbot: On the first page of [240] Plaintiffs proposed instruction No. 1, the paragraph that

begins "In connection with this defense you are instructed that you must also consider——"

The Court: Well, I think I'll strike that out, too, because I don't think there's any evidence here of due diligence. I don't think that has anything to do with the issues in this case so I'll strike out, beginning with "In connection" and all that paragraph and then the subdivision marked "3."

Mr. Talbot: Now,——

Mr. Nesbett: Your Honor, before I pass up any privileges, is this the point to argue our points and——

The Court: All right. Have you got anything to say? It's already been argued. You presented to me the other day and we argued as to questions of due diligence and you presented your theory. I may not agree with your theory, but you go ahead. What's your theory now?

Mr. Nesbett: The result of striking the instruction with respect to that clause of the policy is to ignore Clause 3 of the policy. What was the reason for inserting Clause 3 of the policy referring to Clause 2 unless it was to modify or amplify Clause 2? Therefore, if you strike that Clause 3 you are in effect telling the jury that all they have to find is "whether or not the aircraft was operated in accordance with its operations limitations or not," the inference being that if [241] it was not operated in accordance with its Operations Limitations, the policy does not apply or cover. Now, your Honor, if the parties had intended that in the original insurance contract they could have

said it. Now that same clause of course was cited in the Ninth Circuit case that I have referred your Honor to. I know your Honor has read it so I am not going to belabor that point, but the effect of it is to make what is listed as a general condition in the policy, to make that an exclusion. If they would have wanted an exclusion they would have put it in the exclusions. Instead they moved it down to the general conditions and set it out as Clause 2 and modified it with Clause 3. What was the reason for Clause 3 unless it was to be considered in connection with Clause 2 which it mentions?

The Court: All right, I'll strike out the paragraph in Clause 3. Any other objections to——

Mr. Talbot: Yes, your Honor. The third line from the bottom of page 1, the word "not" should be inserted after the word "have."

The Court: Well, I—it's evidently inserted in my copy. It says, "If you find that the Defendants have not proven * * *" It's already inserted in this. I supposed it was inserted in the copy; I don't know.

Mr. Talbot: No, it wasn't. Now, on page 2——

Mr. Nesbett: Pardon me. Your Honor, what was your [242] ruling on my——

The Court: Well, you have inserted, the third line from the bottom, you have inserted the word "not" after "have." At least I assume you have, because it was there when I got the instructions from you.

Mr. Nesbett: Oh, yes, sir, but I was wondering what your ruling was with respect to leaving in

the portion of the instruction dealing with Clause 3?

The Court: Oh, I struck it out, didn't you hear?

Mr. Nesbett: It's removed?

The Court: My ruling stands. I'll strike out——

Mr. Talbot: Your Honor, on page 2, the entire first sentence, the gist of it is and the burden of it is, that we have to show that the crash was caused by the overloading. Now, that is contrary to my understanding, interpretation of this policy.

The Court: Well, the first sentence refers to paragraph 3. I have stricken out paragraph 3 and I'll strike out the first sentence. However, I'll leave in the last sentence in which case, "If you find that the Defendants have not proven by a preponderance of the evidence that the actual loss of the airplane was caused by overloading then you must find for the Plaintiff on this defense." And I think that is a proper statement.

Mr. Talbot: No, your Honor, because [243] that would require us to prove what caused this crash —and this is the Bruce case—this is the question of whether or not the parachutes, the absence of the parachutes contributed to the crash and the Bruce case is right in point and it says,"if you violated the regulations and if the violation of regulations was prohibited by the policy they, the insurance company, need not show any cause or relationship between the violation of the regulations and the crash.

The Court: I will leave that paragraph in.

Mr. Talbot: All right.

The Court: And I have stricken out the last paragraph. Now we come to proposed Instruction No. 2. Do you have any objection to proposed Instruction No. 2?

Mr. Talbot: Yes, your Honor. I think that the words "purpose"—that the word "purpose" and the word "use" do not require definition. They're plain, ordinary, understandable words and I think that the definitions might tend to confuse the jury.

The Court: Well, I will overrule your objection. On the second page is the next to the last paragraph after the word "consent" on the third line I have stricken out "of responsible officials." I think that is a question of fact for the jury to determine whether or not the airplane company had knowledge and they may have knowledge even though an official doesn't have knowledge. Otherwise I think the rest [244] of the instruction is good.

Mr. Talbot: Your Honor, I object to the first paragraph on page 2 of Instruction No. 2, the paragraph that reads, "If you find that the defendants have not proven by a preponderance of the evidence that the plaintiff in attempting to transport dynamite from Iliamna Bay to Big Mountain were using the airplane for an unlawful purpose, then you must find for the plaintiff on this defense." I urge upon the court that whether or not this was an unlawful use is a question of law for the court and not a question of fact for the jury.

The Court: I will overrule the objection. That

is one of the questions for the jury to determine whether it was an unlawful purpose or unlawful use. Have you any objections to Plaintiffs Instruction 3?

Mr. Talbot: Yes, your Honor. The policy immediately—strike that. The paragraph immediately after the quotations and regulations which begins, "In this connection the plaintiff contends that Civil Aeronautics Board Order S-712" covers the flight in question. I say, your Honor, that it's clear from a reading of that regulation and matter of law that that regulation had nothing whatever to do with this flight and there is no evidence. For example, that regulation provides that the United States Air Force may ship certain classified explosives from Tucson, Arizona in aircrafts specifically chartered by the Air Force for that purpose and there's nothing [245] in this case that would bring it within the terms of Order No. S-712.

The Court: May I see Order S-712? That's Exhibit A. May I see Exhibit A? (The exhibit was handed to the Court.) Well, it is true that in the beginning preamble it says "Tucson, Arizona" but the Order doesn't say Tucson, the Order doesn't restrict it to Tucson. If it does I can't find it.

Mr. Talbot: It doesn't say Tucson in the body of the Order but reading the regulation as a whole and especially the part "plane especially chartered by the Air Force."

The Court: I'm sorry, but it's the Order that counts and not the preamble that goes before, so I will overrule your objection. Any other objections to 3?

Mr. Talbot: Yes, your Honor. We object to the last 2 paragraphs. Mr. Nesbett would have the burden cast upon us to prove that.

The Court: Well, I think the burden is upon you. You are the one that is raising this defense. The burden is upon you.

Mr. Talbot: But we don't—only an insane man, and I may be one, your Honor—but only an insane man would claim that we have got the burden of proving Haley crashed for want of a piece of [246] paper.

The Court: You are raising the exceptions and it's your defense and the burden of proof is upon the party who presents the issue, and you are presenting the issue here.

Mr. Talbot: Well, the policy said they had to get a waiver and they didn't get it and I think we proved that, but we don't have to go on and prove for the want of a piece of paper in the home office this plane crashed.

The Court: Well, I think that's a question for the jury. I might feel that whether you did or didn't have authority had nothing to do with the crash. I don't think the fact that they had authority or didn't have authority had anything to do with the crash at all.

Mr. Talbot: I agree with your Honor, absolutely.

The Court: I will overrule your objection. And you also object to the last paragraph on the page?

Mr. Talbot: Yes, your Honor.

The Court: Well, I will overrule the objection to that unless you have got some good reasons.

Mr. Talbot: Well, that's the same argument. We're not prepared to show that lack of a writing from Farwest General Agency caused this crash.

The Court: All right. I'll overrule your objection. Now we will consider Defendants proposed instrustions, and Instruction No. 1—I have modified it and I will give you the modifications before we discuss any objections. On the [247] bottom of the page, page 1, that after the word "destroyed" I think should be put in "provided you find a waiver was necessary:"

Mr. Nesbett: The bottom of page 1, your Honor?

The Court: Yes, after the word "destroyed," I think ought to be put in "provided you find a waiver was necessary." Then on page 2, on line 2 after the word "authority" should also put in the words, "and find that a waiver was necessary." I think an issue here is whether or not a waiver was necessary.

Mr. Talbot: I'm sorry, your Honor——

The Court: Page 2, after the word "authority" * * * "and find that a waiver was necessary." Then at the bottom of the page beginning with the paragraph "Concerning the knowledge and consent of Cordova Airlines of the carrying of dynamite on the flight in question, is a question of fact for you to determine." That I have stricken out "If you find that dynamite was in fact carried, you are instructed that," and then, "ordinarily"—I have in-

serted the word "ordinarily" in next to the last line, "the knowledge and consent of an agent is attributable to and is legally binding upon the principal." Now I suppose that same rule will apply to a master and servant, that if the servant has knowledge, then the knowledge is imputed to the master. And then I have struck out the rest of the instruction. That is all of the instruction on [248] page 3. Now, Mr. Nesbett, if you want to——

Mr. Nesbett: That's line where—from which words, your Honor, after "Cordova Airlines"?

The Court: Well, everything after the word "upon" on line 2 and I inserted the word "principal," period.

Mr. Nesbett: And the last line on page 2 would read, "attributable to and is legally binding upon the principal"?

The Court: "Upon the principal."

Mr. Nesbett: And the rest of the instruction is stricken?

The Court: And the rest of the instruction is stricken. Now I might ask the Defendant if he wants to argue about the striking of this instruction? I'm trying to avoid trying to give to the jury any impression as to a finding as to the facts and I think that the instruction is struck which could be construed that I am telling the jury what the facts are.

Mr. Talbot: It involves the question of whether or not as a matter of law this was an unlawful purpose from the undisputed facts. I think your Honor has ruled upon that.

The Court: Now, I find no objection to Instruction No. 2. Mr. Nesbett, do you have any objections?

Mr. Nesbett: I see no purpose, your Honor, in line——

The Court: On what?

Mr. Nesbett: Line 10, the instruction that "it being [249] a criminal offense for any person knowingly to violate the provisions of a regulation" having no application to this particular case whatsoever.

The Court: Well, I will overrule the objection because you have asked Mr. Smith if he had ever been prosecuted and he said no.

Mr. Nesbett: Very well.

The Court: Or any Complaint had been filed. I propose to strike out entire Instruction No. 3. You know we haven't had any testimony at all about the Farwest General Agency.

Mr. Talbot: Well, it's in the policy, your Honor. It's provision is in the policy on which the action is based. It states that Farwest General Agency is the agent of the insured, gives their address and all. I don't think we need any testimony about them.

The Court: Where is it in the policy?

Mr. Talbot: That's General Exclusions, 1 (c).

The Court: May I have the Exclusions, then?

(The document was handed to the Court.)

Mr. Talbot: And the other side of the sheet, your Honor, makes clear who Farwest Agency is at the top. In fact, they executed this certificate of

insurance itself as agent for Lloyd's, Underwriters, at Lloyd's, London.

The Court: Mr. Nesbett, what have you got to say?

Mr. Nesbett: Well, your Honor, that goes into the [250] very clause that is covered in Instruction No. 2, I believe, of mine. If I remember, it commences under the General Exclusions, the certificate and/or policy does not cover and then, number one: "Any loss, damage or liability arising from" and then we skip down to "or any flying in which a waiver issued by the CAA is required unless with the express written consent of Farwest." Now I see no objection to inserting "Farwest" somewhere in the other instructions at the appropriate point if Mr. Talbot considers it necessary, but to separate an instruction such as this is written ignores absolutely the wording of the exclusion that it does not cover what the damage or loss must arise from; the policy specifically says so. This instruction wouldn't conform to the law of the case as apparently your Honor conceives it at all.

The Court: Well, do you contend that the failure to notify Farwest General Agency is something that arose from the loss of the plane? In other words, the fact that you did or didn't give notice to the agency, does that mean that the loss of the plane arose from the lack of knowledge?

Mr. Talbot: Yes, sir, if they had requested permission from Farwest General Agency in accordance with this policy this flight would never have taken place; I'm convinced of that.

Mr. Nesbett: Well, that's personal opinion. I submit we have to go by the wording of the contract itself. My [251] interpretation of it is that—well, the policy specifically says, "any damage," your Honor, in paragraph 1 of Exclusion, first line: "Any loss, damage or liability arising from," meaning growing out of, or as a result of. Then skip down to the bottom of (c), "any flying in which a waiver issued by the CAA is required unless the Farwest Agency agrees."

The Court: Well, I am going to refuse to give Instruction No. 2. Instruction No. 4—I don't like these instructions that say, "Then your verdict must be for the Defendants and against the Plaintiffs" because you cannot get all the instructions in one instruction and here's just one issue that is presented and then I say to the jury, "Well, now, if you find on that one issue alone, then you have to find so and so."

Mr. Talbot: Well, we submit——

The Court: If you say, "must be for the Defendants and against the Plaintiffs 'on this issue'" it may be different.

Mr. Talbot: Well, your Honor, we pleaded this as a separate complete affirmative defense and if we prevail on this one issue that is the end of the lawsuit and that's why the instruction is worded that way.

Mr. Nesbett: Your Honor, as it terminates there it's thoroughly inconsistent with the previous instruction you approved, because it says in effect if the jury finds it's overloaded in violation of the

approved operations and [252] limitations then you must find for Lloyd's. That isn't the case. If the jury finds that it was overloaded they must next then find that the overload caused the crash. Then they can find for the Defendants and that I believe is one of the instructions you approved.

The Court: Well, don't you think it would be cured if we inserted the words, after "Plaintiffs," "on this issue"? Here's an issue here I think that the jury is going to have to find whether or not at the time the plane crashed it was overloaded and it was in violation of operation limitations or CAA Approved Operations Manual.

Mr. Nesbett: And that by reason——

The Court: Pardon?

Mr. Nesbett: And that by reason of the overload the plane did crash. Is that what you propose to add?

The Court: No, I just say, "upon this issue"; that is upon the overloading issue.

Mr. Nesbett: Then the wording is—the last sentence would read, "If you find that at the time it crashed the aircraft was overloaded, in violation of its Operations Limitations or CAA Approved Operations Manual, then your verdict must be for the Defendants and against the Plaintiffs"?

The Court: "On this issue."

Mr. Nesbett: "On this issue." Now, how would that, your Honor, reconcile with Instruction No. 1, the [253] portion on page 2 of Instruction No. 1, the remaining portion that you did not strike?

The Court: What sentence are you referring to?

Mr. Nesbett: "If you find that the Defendants have not proven by a preponderance of the evidence that the actual loss of the airplane was caused by * * *"

The Court: Wait a minute. What page are you referring to?

Mr. Nesbett: That is Plaintiffs proposed Instruction No. 1.

The Court: Oh, Plaintiffs Instruction 1?

Mr. Nesbett: Yes, sir. It would be on the second page.

The Court: The second page?

Mr. Nesbett: Yes, the second paragraph, that's the remaining portion that you didn't strike. Now that, taken in connection with Instruction 4, as your Honor's terminated, I suggest would leave them in a quandary, wouldn't it?

The Court: Well, in Defendants Instruction 4: "If you find that at the time it crashed the aircraft was overloaded, in violation of," and so forth, "then your verdict must be for the Defendants." Plaintiffs 1: "If you find that the Defendants have not proven by a preponderance of the evidence that the actual loss of the airplane was caused by the overloading * * *" Well, you see, Plaintiffs says, "by the preponderance of the [254] evidence." I don't think that there's anything inconsistent with those two instructions. Well, I will give Instruction No. 4.

Mr. Nesbett: Adding the words, "on this issue," sir?

The Court: Adding the words, "on this issue"

after the word "Plaintiffs." Now, I don't see anything wrong with Instruction No. 5 but I suppose I'm going to have an argument from you, Mr. Nesbett, so you can tell me what you disagree with in No. 5.

Mr. Nesbett: Well, first of all it attempts to recap all the other instructions and it can be entirely confusing in attempting to do that. The defenses they have asserted are certainly set out in separate instructions and even recognized separately in my proposed instructions.

Mr. Talbot: I can't see anything, for example, what confusion would be caused by paragraph 2, for example, of Instruction 5?

Mr. Nesbett: What purpose does it serve? How does it elucidate or help the jury to find their way along? It's covered thoroughly in another instruction as to the effect and meaning of obtaining the consent of Farwest General Agency.

The Court: Well, I'll strike then the first 1, 2, 3 defenses because I think the defenses have been set forth.

Mr. Nesbett: The other—the rest of the instruction merely tells the jury, "Now, Lloyd's have asserted various defenses which they are entitled to do." Well, they have never [255] questioned that; the policy is in evidence. Pertinent provisions are even quoted in the instructions.

The Court: Well, I find no harm in giving that. I'm coming down to the last page, 9, "You are also instructed that Defendants need not prove any relationship of cause and effect between any of the

alleged breaches of the certificate of insurance and the crash of the aircraft." Do you object to that?

Mr. Nesbett: Your Honor, we have come to a point that I have never had an opportunity to argue to your Honor.

The Court: Well, I have read the cases that have been cited here and I think that that is the rule. I think the cases hold that there does not have to be any relationship between cause and effect.

Mr. Nesbett: Your Honor, if your Honor will analyze the Bruce case, if your Honor will analyze any of the other cases cited by Mr. Talbot you will find that they were dealing with a policy where there was an exclusion in every instance, an exclusion where the policy said, "this policy shall not apply," or "this policy does not cover," and then dealing specifically with high explosives in each instance, with one exception, and that is the Hansen case where they dealt with unlawful purpose and also a violation of the regulations. Now——

The Court: Well, I have read each of the cases as cited by counsel and I think the cases sustain his theory. [256] And not only that, but I Shepardized them to see what happened to them and I can't find where they have been overruled.

Mr. Nesbett: I Shepardized every one of them and read all the citations and, your Honor, every one of them dealt with the situation as I mentioned, as an exclusion where the policy never in the first place covered. Now, you have got the difference between an exclusion and the condition, because in

the condition the policy does cover subject to a condition subsequent.

The Court: Well, you have made your objection and I will overrule the objection and I will give the instruction. Now, there's one phase of the law here that neither counsel seems to have paid any attention to and I think it's rather important, so I provided an instruction. I will read it to you and I expect I'll have some objections to it. "You are instructed that the insurance policy in this case was written by the defendant insurance company, and inasmuch as defendant wrote the policy the language thereof must be interpreted and construed most favorably to the insured and against the insurer. And when the language is susceptible to two constructions it should be construed most favorably in favor of the insured.

Exceptions and conditions are constructed strictly against the insurance company in whose favor they are made; and if there is any doubt whether the words of the contract were used in a large or restricted sense, other things being equal the [257] construction must be adopted which is most beneficial to the insured."

Now, I might say that I have picked that out bodily from the opinion that I am filing in an insurance company case. I have cited California cases. Now, it may be that the California rule doesn't apply up here, but it seems to me that this is something that should be called to the attention of the jury. Now I will hear you.

Mr. Talbot: We object most strenuously to that

instruction, your Honor. It's perfectly good law, of course, but it's only the law in a case where there is some ambiguity in the provisions of the policy upon which the insurance companies rely.

The Court: Well, don't you think there is ambiguity here?

Mr. Talbot: None whatever, and we rely on three of the most plain, simple, ordinary English sentences ever constructed by an insurance company, and——

The Court: We are having a dispute here. We have a lawsuit; there must be some dispute.

Mr. Talbot: But not over the plain and simple language of these three provisions, your Honor, and I think that instruction is—would have to be interpreted by the jury as a finding by the Court that there is some ambiguity in these three short, simple phrases upon which we rely. Now, if [258] the Court can find some ambiguity in any one of those three phrases or sentences, then I say as a matter of law it's up to the Court to resolve that ambiguity and to construe this document for the jury and tell the jury what it means if it's ambiguous and construe it against the insurance companies to be sure, but that's the job for the Court and not for the layman on the jury, and to turn them loose on this policy with instruction of that kind, I think your Honor will have them finding ambiguities all over the plane where they don't exist. I frankly and honestly am not confused by any provisions in here. It's just simple, straightforward talk. You have got to get the written consent

from Farwest General Agency. There's no ambiguity, and so on. I agree wholeheartedly with the instruction, but I think—as being the law—but I think it's something that the Court should apply and determine if the Court finds that these are ambiguities.

The Court: What do you mean by "Any loss, damage or liability arising from," is that clear?

Mr. Talbot: "Any loss, damage or liability arising from any flying * * *" that is, that means flying in which the plane crashes. That is what we have got here. There's no dispute about that. There was flying and the plane crashed.

Now, to go on: "In which a waiver issued by the Civil Aeronautics Authority is required * * *" Now, that's a matter of law for your Honor, whether or not under the CAB [259] regulations a waiver was required. It was or it wasn't—question of law for the Court and not a question of fact for the jury. But no ambiguity, certainly, "unless with the express written consent of Farwest General Agency for insurers." Well, there's nothing there to construe. There's no ambiguity to resolve.

The Court: What do you have to say?

Mr. Nesbett: Well, I think your Honor's instruction is exactly proper. Mr. Talbot and I disagree—I disagree with your Honor as to cause and effect where it's only condition—I say the Bruce case applies only to an exception there. Now, three reasonable people—myself, understand it. I read that first clause in the exception as applying to any loss arising out of flying in which a waiver

should have been procured and wasn't as applying and being intended to apply in situations where airplanes—say, for example, are damaged and partially repaired and required ferry permit and to fly them back to base to repair, where failure to obtain that waiver would have prevented flying that airplane in an unairworthy condition. Now that would be the specific application and I think the reason for it was like that, for a clause like that, and as long as he's raising a technical defense that a waiver was not obtained to carry dynamite when it's conceded that the dynamite had nothing to do with the accident—he's simply relying on a technical wording of a provision and certainly 3 or 4, [260] possibly all 12 jurors can see it in a different light and certainly guidance to them as to how—what they should be guided by in resolving those ambiguities is helpful.

And, your Honor, I happened to just be briefing one of your colleagues, Judge Yankwich, in Southern District of California where he had an airlines case and he did just exactly that and I have the citation. But it seems applicable there at that time, appropriate in that case, and I think it is here.

The Court: Just a minute—you're getting too fast—we're getting in front of the reporter. (Short pause.)

Well, insurance policies have been a great mystery to me. I have been reading them from—well, for many years from the bench and every time I read one I'm amazed at how much I can't understand about them and when we started this case

there was quite an argument here about what is meant between general exclusions and general conditions. Now, I don't know yet what they mean by general—what the difference is between general exclusions and general conditions. Personally, I think this is a question for the jury.

However, now I'm—I've added to my instruction: "If you find there is any ambiguity between the general exclusions and general conditions." Then what we are concerned here is not with the policy but the exclusions and the conditions. The Defendant is relying upon a general condition as well as a [261] general exclusion. I don't know what the meaning—what the difference is and I doubt if anybody can tell me except maybe somebody, some insurance man who wrote this and knows and understands it. And I see no—I think that an insurance Company, when they write the insurance policy should write it so everybody can understand it, particularly the insured and more particularly the Court. The Court can't understand it, so I think it's a proper instruction and I will give the instruction and it is given.

Mr. Nesbett: Where were those words inserted, your Honor?

The Court: At the beginning: "If you find there is any ambiguity between the general exclusions and general conditions you are instructed that the insurance policy in this case was written by the defendant insurance company * * *" Now, I also have some general instructions here that I am going to give relative to the general law, burden of

proof and so forth and so on. I don't think it's necessary to discuss them with you because these are instructions that have been mimeographed here and have been given by the Court. How much time are you going to want to argue this case?

Mr. Talbot: I could use a couple hours very easily, your Honor.

The Court: No, you can't either.

Mr. Talbot: If I had it. [262]

The Court: Well, this is a technical case. Ordinarily I restrict parties to 30 minutes on the side, but I might do better than that.

Mr. Talbot: Our rules allow an hour, your Honor.

The Court: An hour?

Mr. Talbot: Yes, sir. Local rule.

The Court: What's your rule?

Mr. Talbot: It's right next to the number Mr. Nesbett hooked me on or he may yet.

Mr. Nesbett: That would be about Rule 3, then.

Mr. Talbot: Rule 3, I believe.

The Court: I think 45 minutes ought to be sufficient in this case, to the side. And I will call down the jury and let you start your argument.

Mr. Nesbett: Your Honor, can't we have a few minutes to assemble our data here before we start?

The Court: Well, who is going to open the argument here? There's no—I don't think there's any dispute as far as the Plaintiff is concerned. The burden here, if I understand the case correctly, the Defendants will admit that there is liability unless they are relieved by the exceptions or the exclusions

and it seems to me that the Defendants ought to open and close.

Mr. Nesbett: If that is your Honor's ruling that is it. [263]

The Court: What are you going to argue about your case? They admit it. Are you going to anticipate the argument of the Defendant?

Mr. Nesbett: At this point, now knowing his proof, I can certainly set out as a Plaintiff and make an opening and closing argument and the rule does say Plaintiff—it doesn't say the affirmative defendant or anything of that nature.

The Court: Well, do you want to open and close?

Mr. Nesbett: Well, I had expected that that would be my privilege.

The Court: Well, now, you're not ready. You want to gather your notes together. Maybe opposing counsel is ready?

Mr. Talbot: I'd like 5 minutes at least, your Honor.

The Court: All right. We'll give you 5 minutes. We will recess until 5 minutes to 4:00. Call the jury down 5 minutes to 4:00.

(Whereupon, at 3:55 o'clock p.m., June 3, 1958, court reconvenes following a 5-minute recess, the jury having resumed their places in the jury box, and the following proceedings were had:)

The Court: Is it stipulated that the jurors are present in the box?

Mr. Nesbett: Yes, your Honor.

Mr. Talbot: Your Honor, before Mr. Nesbett begins, may I inquire if your Honor is going to instruct the jury this [264] evening?

The Court: No.

Mr. Talbot: Might I suggest, your Honor, that Mr. Nesbett and I might have a chance to meet with your Honor briefly again in the morning before the jury is instructed? My thought was that counsel could examine the instructions this evening on the question of whether or not there is some ambiguity between them.

The Court: Well, I think the rule provides that the Court should advise the attorneys as to what instructions it intends to give and that is all it requires.

Mr. Talbot: Yes, I am sure of that, your Honor.

The Court: And we have had one conference and I don't believe I'll have time in the morning to have another conference. I will allow each side 45 minutes to argue the case. Now, I don't mean 46 minutes or 48 minutes; I mean 45 minutes. I am going to hold you to strict compliance with the time.

(Thereupon, argument was had by both counsel for the Plaintiffs and counsel for the Defendants, after which the following proceedings were had:)

The Court: Ladies and gentlemen of the jury, we are about to take another recess. Again it is my duty to admonish you you are not to discuss this case with anyone, you are not allowed to have any-

one discuss it with you. Even though [265] you have heard all the evidence in this case and the arguments of counsel you are not qualified at this time to formulate or express any opinion as to the rights of the parties. You will not be qualified until after the Court has read you the instructions and submitted this case to you for your decision. Until that time you are to keep an open and free mind without coming to any conclusion as to whether the Plaintiff should or should not recover and above all, not to talk to anyone, allow anyone to talk to you or express any opinion as to the rights of the parties. With that admonition we will now recess until 10:00 o'clock tomorrow morning.

(Thereupon, at 5:15 o'clock p.m., June 3, 1958, this case was continued to the next morning at 10:00 o'clock a.m., June 4, 1958.) [266]

The Court: Is it stipulated that the Jury is present in the box?

Mr. Nesbett: Yes, your Honor.

Mr. Talbot: Yes, your Honor.

INSTRUCTIONS TO THE JURY

The Court: Let the record show a motion has been filed this morning—a written motion has been filed. I will give the Clerk the file. Under the rules, I will deny the motion.

Ladies and Gentlemen of the Jury: You have heard the evidence in this case and it now becomes my duty to instruct you as to the law applicable thereto.

When you were accepted as jurors, you obligated yourselves by oath to try well and truly the matters at issue between the Plaintiff and the Defendant in this case and a true verdict render according to law and the evidence as given to you on the trial. That oath means that you are not to be swayed by passion, sympathy or prejudice, but that your verdict should be the result of your careful consideration of all the evidence in the case. It is equally your duty to accept and follow the law as given to you in the instructions of the Court, even though you may think that the law should be otherwise. It is the exclusive province of the jury to determine the facts in the case, applying thereto the law as declared to you by the Court in these instructions, when [268] arrived at in a regular and legal manner, is final and conclusive upon the Court. Therefore, the greater ultimate responsibility in the trial of the case rests upon you because you are the triers of the facts.

All questions of law, including the admissibility of testimony, the facts preliminary to such admissions, the construction of statutes and other writings, and other rules of evidence are to be decided by the Court and all discussions of law addressed to the Court; and although every jury has the power to find a general verdict which includes questions of law as well as of fact, you are not to attempt to correct by your verdict what you may believe to be errors of law made by the Court.

All questions of fact—unless so intimately related to matters of law that a determination must

be made thereon by the Court as questions of law—must be decided by the jury, and all evidence thereon addressed to them. Since the law places upon the Court the duty of deciding what testimony may be admitted in the trial of the case, you should not consider any testimony that may have been offered and rejected by the Court, or admitted and thereafter stricken out by the Court.

You are the sole judges of the credibility of the witnesses, and in determining the credit you will give to a witness and the weight and value you will attach to his [269] testimony, you should take into account the conduct and appearance of the witness upon the stand; the interest he has, if any, in the result of the trial; the motive he has in testifying, if any is shown; his relation to and feeling for or against any of the parties to the case; the probability or improbability of the statements of such witnesses; the opportunity he had to observe and be informed as to matters respecting which he gave evidence before you; and the inclination he evinced, in your judgment, to speak the truth or otherwise as to matters within his knowledge.

The law makes you subject to the limitations of these instructions, the sole judge of the effect and value of evidence addressed to you.

However, your power of judging the effect of evidence is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence.

You are not bound to find in conformity with the declarations of any number of witnesses which

do not produce conviction in your minds, against the declarations of witnesses fewer in number, or against a presumption or other evidence satisfying your minds.

A witness wilfully false in one part of his testimony may be distrusted in others. A witness is presumed to tell the truth. [270]

Testimony of the oral admissions of a party should be viewed with caution.

Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict, and, therefore, if the weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust. Some of the evidence in this case is of the type called "circumstantial" and distinguished from direct evidence; direct evidence is given when a witness testified of his own actual and personal knowledge of the facts in issues and to be proved. Circumstantial evidence is given when a witness testifies in like manner to facts from which may be inferred, the facts in issue and to be proved. Accordingly, circumstantial evidence may be defined as that type of evidence in which proof is given of certain facts and circumstances from which the jury may infer other and connected facts which usually and reasonably follow from the facts testified to according to reason in the common experi

ence of mankind. Circumstantial evidence is sometimes quite as convincing as direct evidence; in other cases, less so, but to be of any weight or force against a person—but to be of any force or weight in a case, [271] circumstantial evidence must be of such nature as reasonably to lead to the inference of the fact to be proved; in cases where proof consists of both direct and circumstantial evidence, both should be carefully considered. It is for you to determine the weight of all the evidence that has been admitted in this trial for your decision.

You are not bound to believe something to be a fact simply because a witness has stated it to be a fact, if you believe from all the evidence that such witness is mistaken or has testified falsely concerning such alleged fact.

Where witnesses testify directly opposite to each other on a given point, and are the only ones that testify directly to that point, you are not bound to consider the evidence evenly balanced or the point not proved; but in determining which witness you believe on that point, you may consider all the surrounding facts and circumstances proved on the trial, and you may believe one witness rather than another if you think that such facts and circumstances warrant it.

During the trial of a case, it may be suggested or argued that the credibility of the witness has been "impeached." To "impeach" a witness means to bring or throw discredit on; to call in question;

to challenge; to impute some fault or defect to. [272]

The credibility of a witness may be impeached by the nature of his testimony, or by contradictory evidence, or by evidence affecting his character for truth, honesty or integrity; or by proof of his bias, or by proof that he has been convicted of a crime. The credibility of a witness may also be impeached by evidence that at other times he has made statements inconsistent with his present testimony as to any matter material to the case. However, the impeachment of the credibility of a witness does not necessarily mean that his testimony is completely deprived of value or even that its value is lessened in any degree. The effect, if any, of the impeachment of the credibility of the witness is for the jury to determine.

Discrepancies in the testimony of a witness, or between his testimony and that of others, if there be any, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent mistake in recollection is not uncommon. It is a fact, also, that two persons witnessing an incident or a transaction often will see or hear it differently, or see or hear only portions of it, or that their recollections of it will disagree. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing significance. But a wilful falsehood always is a matter of importance. Whenever it is practicable [273] and reasonable, you will attempt to reconcile conflicting or in

consistent testimony, but in every trial you should give credence to that testimony which, under all the facts and circumstances of the case, reasonably appeals to you as the most worthy of belief.

In this case as in all civil cases the burden is upon the plaintiff to prove his case by a preponderance of the evidence. On the other hand, in this case the burden is upon the defendant to prove by a preponderance of the evidence the claims that he has made in his claims that the policy does not provide protection. Preponderance of evidence, what I am trying to say, is this: That ordinarily, if the plaintiff has the burden of proving this case by preponderance of the evidence but when in this case the defendant raises an issue which has been raised here, then the preponderance is upon the defendant to sustain that issue. Preponderance of evidence means the greater weight of evidence, such evidence as when weighed with the evidence which is offered to oppose it has a greater convincing power in the minds of the jury. While the plaintiff is required to prove his case and that is true also as to the defendant in this case, that is, to prove his claims by the greater weight of evidence, this does not require proof beyond any fact; does not require the parties to prove any fact beyond a preponderance of the evidence. A fact is [274] sufficiently proved if the greater weight of the evidence is in its favor. If the weight of evidence in your minds is equally balanced as between plaintiff and defendant or in this case, if it's balanced between the defendant and the plaintiff upon the claim of

the exemptions, then the weight should be—then the verdict should be against the party who had the duty of proving the case. In other words, the party who presents the issue has a duty of proving his case and his evidence must be such when considered as a whole as to justify you finding in favor of the parties who present the issue to you for your determination.

While you are not justified in departing from the rules of evidence as stated by the Court, or in disregarding any part of these instructions, or in deciding the case on abstract notions of your own, or in being influenced by anything except the evidence or lack of evidence as to the facts of the case, and the instructions of the Court as to the law, and the inferences properly to be drawn from the facts and from the law as applied to the facts, there is nothing to prevent you from applying to the facts of this case the sound common sense and experience in affairs of life which you ordinarily use in your daily transactions which you would apply to any other subject coming under your consideration and demanding your judgment.

You are to consider these instructions as a [275] whole. It is impossible to cover the entire case with a single instruction and it is not your province to elect one particular instruction and consider it to the exclusion of the other instructions.

As you have been heretofore charged, your duty is to determine the facts from the evidence admitted in the case and apply those facts and apply

to those facts the law as given to you by the Court in these instructions.

During the trial I have not intended to make any comment on the facts or express any opinion in regard thereto. If, by mischance, I have, or if you think I have, it is your duty to disregard that comment or opinion entirely, because the responsibility for the determination of the facts in this case rests upon you, and upon you alone.

It is the duty and the right of an attorney to protect the interests of his clients by objecting to the introduction of, or moving to strike out, evidence that he deems improper, as well as to offer evidence he believes competent for admission. You must not be rejudiced against any party to this case because the attorney for such party may have made such objections or motions or offers, regardless of the Court's ruling thereon.

At the close of the trial, counsel have the right to argue the case to the jury. The arguments [276] of counsel, based upon study and thought, may be, and usually are, distinctly helpful; however, it should be remembered that arguments of counsel are not evidence and cannot rightly be considered as such. It is your duty to give careful attention to the arguments of counsel, so far as the same are based upon the evidence which you have heard and the proper deductions therefrom, and the law as given to you by the Court in these instructions. But arguments of counsel, if they depart from the facts or from the law, should be disregarded. Counsel, although acting in the best of good faith, may

be mistaken in their recollection of testimony during the trial. You are the ones to finally determine what testimony was given in this case, as well as what conclusions of fact should be drawn therefrom.

This is an action upon an insurance contract—an insurance policy—and an insurance policy is nothing more than a contract. If you find that there is any ambiguity in this contract or in the insurance policy between the general exclusions and the general conditions—you will remember that counsel talked to you about exclusions and conditions. If you find that there is any ambiguity between the general exclusions and the general conditions, you are instructed that the insurance policy in this case was written by the defendant insurance company, and inasmuch as the defendant wrote the policy the language thereof must [277] be interpreted and constructed most favorably to the insured and against the insurer. And when the language is susceptible of two constructions it should be construed most favorably in favor of the insured.

Exceptions and conditions are construed strictly against the insurance company in whose favor they are made; and if there is any doubt whether the words of the contract were used in a large or restricted sense, other things being equal the construction must be adopted which is most beneficial to the insured.

You will remember at the beginning of this case I believe that there was an agreement that coverage—that the insurance policy provided coverage

unless the coverage was denied by the exclusions. You are instructed that the defendants have asserted three defenses, which are based upon provisions of the certificate of insurance, which constitutes the only contract or agreement between the parties, and that your verdict must be in favor of the defendants and against the plaintiff if you find, by a preponderance of the evidence—now, I want to stop there and emphasize "preponderance of the evidence." Some of you have served on criminal cases. The rule in criminal cases is different than it is in civil cases. In criminal cases, the rule is that the evidence must be proved beyond a reasonable doubt; in civil cases, it is the preponderance of the evidence. Your verdict [278] must be in favor of the defendants and against the plaintiff if you find by a preponderance of the evidence, having in mind all the instructions given you by the Court, that the defendants have established all or any one of these three defenses. You are also instructed that the defendants need not prove any relationship of cause and effect between any of the alleged breaches of the certificate of insurance and the crash of the aircraft. That is to say, that the defendants need not prove that the alleged carriage of dynamite, or the alleged overloading of the aircraft in any way caused, or contributed to, or increased the likelihood of, the airplane crash which did in fact occur.

The defendants contend, among other defenses, that the policy of insurance here involved relieves them from liability for payment for the loss of the airplane because it was loaded in excess of the

weight permitted in the Operations Limitations as established by the Civil Aeronautics Authority and was therefore in violation of Paragraph 2 of the General Conditions contained in the policy of insurance which reads as follows:

> "2. The aircraft shall be operated at all times in accordance with its Operations Limitations and/or CAA approved Operations Manual, and in accordance with operations authorized as set forth therein." [279]

The defendants have asserted this defense as an affirmative defense and are therefore required to prove all of the elements of the defense by a preponderance of the evidence.

In considering the defense that the airplane was loaded in excess of the permissible load limit at the time it crashed you must consider all the evidence presented by both plaintiff and defendants to determine whether the defendants have proved by a preponderance of the evidence that the airplane actually was loaded in excess of its permissible load limit. If you find that the defendants have not proven by a preponderance of the evidence that the airplane was loaded in excess of its permissible load limits you must find for the plaintiff and against the defendants on this defense.

If you find that the defendants have not proved by the preponderance of the evidence that the actual loss of the airplane was caused by overloading then you must find for the plaintiff on this defense.

The defendants contend, among other defenses,

that Paragraph 4 of the General Exclusions of the policy of insurance here involved relieves them from liability for the payment of the loss of the airplane because it was carrying a quantity of dynamite at the time it crashed in violation of the Civil Air Regulations and the purpose of the flight was therefore unlawful. Paragraph 4 of the General Exclusions [280] insofar as applicable to this defense reads as follows:

> "This certificate and/or policy does not cover the use of the aircraft or any unlawful purpose if with the knowledge and consent of the assured."

This is asserted as an affirmative defense and the burden therefore is on the defendants to prove the material facts to support the defenses by a preponderance of the evidence.

In this connection you are instructed the word "purpose" is defined as "the object; effect, or result, aimed at, intended, or attained."

You are instructed that the meaning of the word "use" is defined as: "The purpose served—a purpose, object or end for useful or advantageous nature, implying that the person receives a benefit from the employment of the factor involved."

You are also instructed that the policy of insurance here involved in Paragraph 8 reads as follows:

"Purposes for which aircraft will be used: Private business and private pleasure flying and commerical operations including passenger and freight

flights for hire or reward but excluding student instruction."

If you find that the Defendants have not proven by a preponderance of the evidence that the plaintiff in attempting [281] to transport dynamite from the Iliamna Bay to Big Mountain were using the airplane for an unlawful purpose then you must find for the plaintiff on this defense.

In this connection you are to consider the reason for and the object of the flight, based upon all of the testimony, in order to determine whether the use of the airplane at the time it crashed was for an unlawful purpose and with the knowledge and consent of the assured, Cordova Airlines, Inc.

If you find that the defendants have proven by a preponderance of the evidence in attempting to transport dynamite the airplane was being used for an unlawful purpose then you must consider whether or not such use of the airplane was with the knowledge and consent of the plaintiff Cordova Airlines.

In this connection you must consider all the evidence and determine whether the defendants have proven by a preponderance of the evidence that such use of the airplane was undertaken with the knowledge and consent of the plaintiff Cordova Airlines, Inc.

The defendants contend, among other defenses, that the flight in question—that for the flight in question, the plaintiff failed to obtain a waiver as required by Civil Air Regulations Part 49 and also failed to obtain written permission from the Far

West General Agency to make the flight [282] in question.

The policy of insurance reads as follows insofar as applicable to this defense:

"This Certificate and/or Policy does not cover:

"1. Any loss, damage or liability arising from:

* * *

"(c) * * * or any flying in which a waiver issued by the Civil Aeronautics Authority is required unless with the express written consent of Farwest General Agency for Insurers."

In this connection the plaintiff contends that Civil Aeronautics Board order S-712, which has been introduced in evidence as Defendants' Exhibit A amounts to a blanket authority to deviate from Part 49 of the Civil Air Regulations and that in the order portion of this exhibit commencing on page 3 the plaintiff was given a blanket authority to carry dynamite on the flight in question and therefore was not required to obtain a specific waiver from Civil Aeronautics Authority.

In this connection you are instructed that the Civil Aeronautics Act defines "United States" as:

"United States" means the several states, the District of Columbia, and the several Territories and possessions of the United States, including the Territorial waters and the overlying air space thereof."

The plaintiff contends that the Territory of [283] Alaska was included in the order, that plaintiff was

engaged in a charter carriage of dynamite belonging to the United States Air Force from a remote location to a United States Air Force airport at Big Mountain and needed no specific written waiver from the Civil Aeronautics Authority for the flight.

If you believe that Defendant's Exhibits A contained blanket authority for the plaintiff to carry the dynamite without a specific written waiver then you must find for the plaintiff on this defense.

If you believe that the Defendant's Exhibit A did not contain blanket authority for the plaintiff to transport the dynamite then you must next consider paragraph 1 (c) of the policy of insurance quoted above and determine whether the defendants have proven by a preponderance of the evidence that the actual loss of the airplane "arose from" and was "the result of" the failure of the plaintiff to obtain a written waiver from the Civil Aeronautics Authority. In this connection you are instructed that the defendants have stipulated that the dynamite did not explode when the airplane crashed and you must accept this as a fact.

If you find that the loss of the airplane "arose from" or was "the result of" plaintiff's failure to obtain a specific written waiver from the Civil Aeronautics Authority and if you further find that plaintiff did not obtain the express written consent, then you must find for the defendants [284] on this issue.

One of the defenses asserted by the defendants in this case is that, at the time it crashed, Cordova Airlines aircraft N-1569-C was being used for an

unlawful purpose, with the knowledge and consent of Cordova Airlines. In considering this defense, you must first determine whether or not the aircraft was engaged in transporting explosives at the time of its loss. If you find that the aircraft was carrying explosives then you must further determine whether or not any explosive so carried consisted of dynamite. If you determine that the plane was carrying dynamite then you must determine whether a waiver was secured by the United States Civil Aeronautics Authority authorizing the carrying of dynamite on the flight on which the aircraft was destroyed, providing you find that a waiver was necessary. If you find that the aircraft was carrying dynamite and no such waiver had been secured and find also that a waiver was necessary from the Civil Aeronautics Authority then you are instructed that the carrying of dynamite was unlawful. Dynamite is classified by the applicable government regulations as a Class A explosive, and the transportation of dynamite was, accordingly, prohibited by such regulations, unless a waiver was secured from the Civil Aeronautics Authority, unless such waiver had been waived. By Act of Congress, it is a criminal offense for any person [285] to knowingly deliver or cause to be delivered to an air carrier or to the operator of any civil aircraft, for transportation in air commerce, or for any person to cause the transportation in air commerce of, any shipment of property the transportation of which is prohibited by any rule, regulation, or requirement prescribed by the United States Civil

Aeronautics Board, relating to the transportation, packing, marking, or description of explosives.

The knowledge and consent of Cordova Airlines of the carrying of dynamite on the flight in question is a question of fact for you to determine. Ordinarily, the knowledge and consent of an agent is attributable to and is legally binding upon the principal.

One of the defenses which the defendants assert is their allegation that the aircraft was not being operated in accordance with its Operations Limitations and/or CAA approved Operations Manual and in accordance with operations authorized as set forth therein. Defendants claim that at the time it crashed the aircraft was overloaded, in violation of said regulations. In considering this defense, you must determine the maximum weight of aircraft and contents allowable under regulations for this particular aircraft. You must next determine whether or not the aircraft was laden in excess of its legal limit. If you find that at the time it crashed the aircraft was overloaded, in violation of [286] its Operations Limitations or CAA approved Operations Manual, then your verdict must be for the defendants and against the plaintiffs on this issue.

Further reference is made to the defense asserted that Cordova Airline aircraft No. N-1569-C was allegedly being used for an unlawful purpose with the knowledge and consent of the plaintiff airline. You are instructed that the applicable United States Civil Aeronautics Board regulations provide that no air carrier or other operator of air-

craft shall knowingly accept explosives for carriage by air unless the shipper or authorized agent has issued a certificate to the air carrier, certifying that the shipment complies with the Civil Aeronautics Board regulations governing the transportation of such explosives and it is a criminal offense for any person knowingly to violate the provisions of said regulation. Such a certificate, that the shipment of explosives complies with the regulations, is required by law prior to the carriage of explosives by air, in addition to any waiver which may or may not have been issued by the Civil Aeronautics Authority for the flight upon which this aircraft was destroyed. If you find, then, that the purpose of this particular flight on December 18, 1955, was to transport a quantity of explosives with respect to which no certificate of compliance had been issued to the air carrier or operator by the shipper, and that such use [287] of the aircraft was with the knowledge and consent of Cordova Airlines, or the pilot (if you find that the pilot was an employee of Cordova Airlines) then your verdict must be for the defendants and against the plaintiff on this issue, without regard to the question of whether or not any waiver had been secured from the Civil Aeronautics Authority for the flight upon which the airplane was destroyed.

The law requires that all twelve jurors must agree upon a verdict before one can be rendered.

While no juror should yield a sincere conclusion, founded upon the law and the evidence of the case, in order to agree with other jurors, every juror, on

considering the case with fellow jurors, should lay aside all undue pride or vanity of personal judgment, and should consider differences of opinion, if any arise, in a spirit of fairness and candor, with an honest desire to get at the truth, and with the view of arriving at a just verdict.

No juror should hesitate to change the opinion he has entertained, or even expressed, if honestly convinced that such opinion is erroneous, even though in so doing he adopts the views and opinions of other jurors.

I have had prepared for your consideration two verdicts which you will take into your jury room. Your first duty in retiring to the jury room will be to elect one of your members as foreman. The foreman will be your spokesman. If [288] you wish to communicate with the Court you will communicate with the Court through your foreman. When you have reached a verdict you will have your foreman to sign the verdict and return it to this Court.

Verdict No. 1 reads as follows:

> "We, the jury, duly impaneled and sworn to try the above-entitled case, do find for the plaintiff and against the defendants, and we do find that the plaintiff is entitled to recover the sum of $15,200.00 from the defendants.
>
> "Dated at Anchorage, Alaska, this .... day of June, 1958."

Verdict No. 2 says:

> "We, the jury, duly impaneled and sworn to

try the above-entitled case, do find for the defendants and against the plaintiff.

"Dated at Anchorage, Alaska, this .... day of June, 1958."

This is a case where you are going to have to find everything for the plaintiff or nothing. There is no way to adjudge just the amount. If you find for the plaintiffs, you are going to have to find for the entire sum of $15,200.00.

Does either the attorney for the plaintiff or the defendant have any objection to the instructions as read to [289] the jury? Now, you have made your record as to the instructions I didn't give. Now, these are as to the instructions that I have given and you have also made your objections as to instructions which I did read to the jury. Now, do you have—at this time, you can—I don't want any argument—you can just make your objections, if you have any objections.

Mr. Talbot: May we approach the bench, your Honor?

The Court: Yes, you may approach the bench.

(Thereupon, both counsel for the plaintiff and the defendant, together with the Court Reporter approached the bench and the following proceedings were had, out of the presence of the jury:)

Mr. Talbot: The defendants object to the instructions as given to the jury by the Court upon the ground that part of the instructions require the

jury, in order to find that the defendants have established their affirmative defenses, to find as a matter of fact that the violations of the policy which defendants allege caused or contributed in a causal fashion to the crash which in fact occurred.

It is our position that the jury need not find any causal relationship whatever between any violation of the conditions and exclusions of the policy on the one hand and the fact of the crash which did occur. That's my——

The Court: Do you have any objections?

Mr. Nesbett: Plaintiffs' only objection are [290] those made at the time the hearing was held yesterday in connection with which instructions were to be given and which deleted and the plaintiffs will adopt only the objections made at that time with respect to the portions that were given.

The Court: Well, you have a record of the transactions yesterday and the objections that were made and the rulings of the Court.

Mr. Nesbett: Yes.

Mr. Talbot: Your Honor, by stating the foregoing objections the defendants do not waive or abandon any of their objections previously made.

There is one other point, your Honor, while we are here: It has been our practice in this court to allow the jury to have the exhibits for their examination as part of their——

The Court: Well, I am going to send them the exhibits.

Mr. Talbot: Thank you, your Honor.

Mr. Nesbett: Does the jury get the instructions?

The Court: No, I won't send them the instructions.

Mr. Talbot: One last point, your Honor. I am wondering if the jury knows that they are entitled to come back to the Court for further instructions if they——

The Court: I am not going to say that to them. I don't want them to come back for further instructions.

Mr. Talbot: Thank you. [291]

The Court: Here, I will give you copies of these verdicts if you want them.

Mr. Nesbett: I have them.

The Court: Oh, you have?

(Thereupon, both counsel for the plaintiff and the defendant, together with the Court Reporter resumed their respective seats and the following proceedings were had in the presence of the jury:)

The Court: Swear the bailiffs.

(Thereupon, the jury bailiffs were sworn.)

The Court: May I have a stipulation from the attorneys that the exhibits may be sent to the jury room?

Mr. Nesbett: Yes, your Honor, the plaintiff agrees.

Mr. Talbot: Yes, your Honor.

The Court: Then I will allow the exhibits to be taken to the jury room, but I say to the jury that I will not allow the instructions to be taken to the

jury room because I do not follow the instructions word by word and if I give you the written instructions, you'd only have part of the instructions, so you will have to remember the instructions—you will have to remember the instructions as read by the Court.

I want to impress upon you again as I have before, that this is a question of fact and you are the ones who determine the facts in this case. You may now retire to the [292] jury room.

(Thereupon, the jurors proceeded to the jury room.)

The Court: Mr. Nesbett, my experience with juries have been that——

Mr. Talbot: Your Honor, there is still a juror present, if the Court please.

(Thereupon, the door to the jury room was closed and the following proceedings were had, out of the presence of the jury:)

The Court: My experience with juries have been that they will not reach a verdict before they at least have one meal. I won't be available until 2:30 o'clock.

Mr. Nesbett: We understand you are going to Palmer?

The Court: And I won't be available until about 2:30, so you needn't make any arrangement to be here until 2:30 or 3:00.

Mr. Nesbett: Thank you.

Recessed: 10:50 o'clock a.m.

Reconvened: 2:45 o'clock p.m.

(At 2:45 o'clock p.m., all counsel being present and the trial jury being present the following proceedings were had:)

The Court: Is it stipulated that the jury is present and in the box? [293]

Mr. Nesbett: Yes, your Honor.

Mr. Talbot: Yes, your Honor.

The Court: Ladies and Gentlemen of the Jury, have you reached a verdict?

The Foreman: We have, your Honor.

The Court: Would you give it to the bailiff, please?

(The verdict was handed to the Court and thereafter handed to the deputy clerk.)

The Court: Read the verdict.

Deputy Clerk: "In the District Court for the District of Alaska, Third Division. Cordova Airlines, etc., Plaintiff, vs. Underwriters, etc., Defendants, No. A-12,349. Verdict No. 1. We, the jury, duly impaneled and sworn to try the above-entitled case, do find for the plaintiff and against the defendants, and we do find that the plaintiff is entitled to recover the sum of $15,200.00 from the defendants.

"Dated at Anchorage, Alaska, this 4th day of June, 1958. Signed Kyle I. Turner, Foreman."

The Court: Ladies and Gentlemen of the Jury, is that your verdict?

Jury: Yes.

The Court: Do you wish the Jury polled?

Mr. Talbot: No, your Honor.

The Court: Ladies and Gentlemen of the Jury, you [294] are about to be excused from further service on this case. I wish to express to you my appreciation of the fact that you have been able to reach a verdict in this case. I don't think this was a simple case by any means; I think it's one of the more difficult cases. The fact that you have been able to reach a verdict seems to me that's some indication, at least, that you have paid attention to the evidence and knew what the testimony was.

You will be excused now until 10:00 o'clock next Monday morning. The Court will stand in recess.

Recessed: 2:55 o'clock p.m. [295]

HEARING ON MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR MOTION FOR NEW TRIAL

Proceedings

June 20, 1958—1:30 o'Clock P.M.

The Court: 12,349, Cordova vs. Lloyd's. Ready?

Mr. Talbot: Yes, your Honor.

The Court: This is your motion and I suppose you can start.

Mr. Talbot: Thank you, your Honor. If the Court please, Mr. Nesbett: Your Honor, before proceeding, I would move the Court for permission to submit a written order amending our motion in the following respect: The motion as filed prayed for judgment notwithstanding the verdict or in the

alternative for a new trial. I should like leave of the Court to amend that motion to provide for judgment notwithstanding the verdict and a new trial and urge the Court to grant both motions.

The Court: Well, I have no objections to the amendment. Will you file a written amendment?

Mr. Talbot: I will, yes, your Honor. Now, your Honor, with reference to the motion for judgment notwithstanding the verdict, this refers to the first two affirmative defenses of the defendants; first, that the aircraft was being used for an unlawful purpose with the knowledge and consent of the assured. In viewing the record and the evidence, your Honor, I feel quite certain that there is no dispute as [297] to any of the material facts necessary to decide that issue; that is, looking back at the entire trial. It seems to me that the only controverted material facts had to do with the question of overloading and that mainly with the issue of how much dynamite was being carried and how much gasoline and other paraphernalia was or was not on board, but with regard to this defense of using the aircraft for an unlawful purpose, the carriage of dynamite and circumstances under which it was carried, are not subject to bona fide dispute, and I, therefore, urge the Court that the question of whether or not the plaintiff was able to bring itself within the coverage and protection afforded by Civil Aeronautics Board regulation S-712 which is Exhibit—a portion of—Exhibit A; that that is a question of law for the Court and one which should be determined by the Court.

My recollection of the instructions which your Honor gave were to the effect that the carriage of dynamite was in violation of regulations of the Civil Aeronautics Board unless permission was granted to plaintiff by this Order No. S-712 which became effective on December 2, sixteen days before the crash, and I would ask your Honor to re-read and reconsider that particular regulation and decide for us whether or not as a matter of law the plaintiff was able to bring itself within the permission granted by that regulation. It seems to us that the plaintiff was not successful in [298] that regard.

There are three particular provisions of the Order, part of this regulation S-712, that I would like to call to the Court's attention: "In consideration of the foregoing, the Board finds that an authorization, as more specifically set forth hereinafter, permitting the Air Force to deviate from certain provisions of Part 49 would not adversely affect safety." So, in the first place, we have an order which allows the Air Force to do certain things, and we submit that this was action taken by Morrison-Knudsen Company and Cordova Airlines, Inc., and not by the United States Air Force.

Now, the very first paragraph of the Order—portion of this regulation—as I read it limits the effect of this Order to the transportation of certain security-classified Class A explosives in civil aircraft. Now, we submit that ordinary garden variety commercial dynamite, which this was, is not a security-classified explosive and that it clearly was

not within the contemplation of the Civil Aeronautics Board when it made regulation S-712.

The next provision in the Order is as follows: "Shipments of such explosives by civil aircraft be restricted to charter or contract aircraft obtained for the exclusive purpose of transporting such explosives." I think it is undisputed, your Honor, that this aircraft was not obtained by the Air Force and that it was not obtained [299] for the exclusive purpose of transporting these explosives. As a matter of fact, Cordova Airlines management denied any knowledge that the plane would be used to carry explosives and the evidence concerning the agreement between Cordova Airlines, Inc., and Morrison-Knudsen was that this was a general ninety-day charter for the carriage of passenger and freight generally.

The next provision requires that the Department of the Air Force certify to the Civil Aeronautics Board that any shipment of explosives carried under this regulation conform with applicable CAB regulations for handling of explosives. We have no evidence that the Air Force took any active part whatever in this movement or—of explosives—or, that they gave the certificate which the regulation required them to do.

There is a further provision that the explosives are to move under a hand-to-hand signature service to be furnished by the carrier; that certainly was not done so far as we know.

It's our position, your Honor, that reading this regulation as a whole, and applying to it the un-

disputed facts, that Cordova has not brought themselves within the coverage of regulation 712 as a matter of law, and that, therefore, the aircraft was being used for an unlawful purpose. [300]

Now, the next phrase, and that exclusion has to do with the knowledge and consent of Cordova Airlines. We submit that as a matter of law, your Honor, the knowledge and consent of the pilot was acting as master of this ship, so to speak, and must be held binding upon Cordova Airlines.

The Court: Didn't I instruct the jury to that effect?

Mr. Talbot: Your Honor——

The Court: I instructed the jury that the knowledge of the agent was the knowledge of the principal.

Mr. Talbot: Your Honor qualified it by saying, "usually" or "customarily."

The Court: Well, that's true; there might be some explanation. Now, I don't know whether that rule is one hundred per cent effective or not, but that's the ordinary rule, ordinarily. I said "ordinarily, the knowledge of the agent is the knowledge of the principal," and I can understand in some instances that rule might not apply.

Mr. Talbot: I agree with your Honor but if there had been any evidence which would tend to change the application of the rule, then I think the instruction would have been proper, but in——

The Court: But if I remember correctly, you didn't request that instruction; that is one of the instructions I gave myself. I thought the jury

should be told that [301] if the pilot had knowledge, well, that would be knowledge of the principal, and if I was handling the case without a jury, deciding the case without a jury, I would have held without any question that the fact that the pilot had knowledge was the knowledge of the company, but I didn't—I wasn't passing upon the facts of the case; I left that to the jury.

Mr. Talbot: Well, we agree that your Honor is not called upon to pass upon the disputed facts, but here, we submitted the following proposed instruction on a point: "You are instructed that the knowledge and consent of the pilot of the aircraft is attributable to and is legally binding upon Cordova Airlines." Your Honor changed that instruction by inserting the word "ordinarily" and omitting "Cordova Airlines" and substituting "the principal," without explaining to the jury what the principal is and I think weakened the instruction to the point where the jury could speculate whether or not they were going to attribute Haley's knowledge to the Airline.

Now, even if Regulation 712 applied here and they had blanket permission to carry explosives, we find no waiver anywhere in Regulation 712 of the CAB requirement that the shipper of any shipment of explosives furnished the carrier with a certificate concerning its compliance with the law and also imposing a positive duty on the carrier to [302] require him to receive such a certificate. There is no evidence that that was done here. The applicable CAB regulation even sets forth a form

of certificate to be given by the shipper with the provision that a certificate in that form will be deemed prima facie compliance with regulations, but I think that in view of that positive requirement of the law, that Cordova Airlines had a burden to show that they or their shipper complied with the regulation and they did not. I concede there is very little evidence upon the point except Mr. Evans' testimony that he did not—he ordered the movement of the explosives and he did not give any certificate. That is my recollection of the extent of the evidence on the point, but it's our position that even if Regulation 712 governed, there still was no excuse for not requiring and receiving the certificate that the shipment complied with CAB regulations and was not, for example, liquid nitroglycerin or some other substance which could not properly be carried under the circumstances.

What I have said about this Regulation 712 applies equally to our second defense; that is, that this plane was engaged in flying for which a waiver of the CAA was required, and a CAA waiver being required, it was also required that Cordova have the express written consent of Farwest General Agency as agent for the Underwriters. I concede that if Regulation 712 applied to this movement, then this defense [303] of failure to get permission from the insurance company fails because then no waiver from CAA would have been required. 712 would have been blanket authority, but in the absence of Regulation 712, or its inapplicability, the only way the dynamite could have been carried

would have been with a CAA waiver and with the permission of the Underwriter.

Now, for those reasons we submit that the defendants are entitled to judgment notwithstanding the verdict on each of these two defenses because the facts are not subject to bona fide dispute—carriage of dynamite and the circumstances of its carriage being admitted all the way around.

Now, with regard to the Motion for a New Trial, this has to do with our third defense that the aircraft was overloaded in violation of its Operations Limitations. I agree that there was a question of fact for the jury as to whether or not the airplane was overloaded. There was in my mind believable evidence on both sides. Mr. Mauer testified eight cases; Mr. Evans testified sixteen cases, and I think it possible that if the jury believed Mr. Mauer, that they might, if they believed other evidence in the case, find that the plane was not overloaded, but in view of the instructions which the Court gave on the point of causal relation between the overloading, if it existed, and the crash, in view of those conflicting instructions, I am unable to know or ascertain whether the jury found the plane was [304] overloaded or whether they didn't.

Your Honor gave at the request of the defendants the following instruction which we believe to be correct, namely, "You are instructed that the defendants need not prove any relationship of cause and effect between any of the alleged breaches of the certificate of insurance and the crash of the

aircraft. That is to say, the defendants need not have proved that the alleged carriage of dynamite, or the alleged overloading of the aircraft, in any way caused, or contributed to, or increased the likelihood of, the airplane crash which did in fact occur."

The Court: When I gave that instruction, I thought the Jury could rely upon that instruction and bring in a verdict for the defendant. Now that was their problem.

Mr. Talbot: Your Honor was telling the Jury that they need not find that the overloading had anything to do with the crash—is the way I read that instruction.

Now, in three previous instructions——

The Court: No, I instructed the Jury that there didn't have to be a causal relationship between the overloading and the crash.

Mr. Talbot: Yes, your Honor, and with that, we wholeheartedly agree.

The Court: And from that, why, I thought maybe the Jury would bring in a verdict for the defendant. [305]

Mr. Talbot: But your Honor earlier instructed them as follows: "If you find that the defendants have not proven by a preponderance of the evidence that the actual loss of the airplane was caused by the overloading, then you must find for the plaintiff on this defense," and later your Honor instructed the Jury that they must "determine whether the defendants have proven by a preponderance of the evidence that the actual loss of the airplane arose

from, and was the result of, a failure of the plaintiff to obtain a written waiver from the Civil Aeronautics Authority," and again, "If you find that the loss of the airplane arose from, or was the result of, plaintiff's failure to obtain a specific written waiver from the CAA, and if you find that the plaintiff did not obtain an express written consent of Farwest General Agency, then you must find for the defendants on this defense."

Now, it seems to me that the Court is telling the Jury with regard to each one of these defenses, (1) they must find a causal relationship between the breach of the policy and the crash and (2) that they don't have to; and it seems to me to be possible that the jury found that the plane was in fact overloaded in violation of regulations but that the overloading did not cause the crash—and following your Honor's earlier instructions, brought in a verdict for the plaintiff.

Now I genuinely believe that there is a conflict in [306] the instructions here on this business of causal relationship that is so totally complete that the issue of overloading ought to be submitted to another jury.

Thank you.

Mr. Nesbett: If your Honor please, that is the very point that I drew your Honor's attention to at the time we were discussing the instructions. I felt that the defendants were not entitled to the instruction that Mr. Talbot just mentioned and that is, that there need be no causal relationship between

the crash and the overloading because it's my contention that there need be—there must be.

As I went back to the exceptions, the exclusions and the general conditions here, your Honor, it only draws to mind the argument that I was making at the time we were discussing the instructions and that is, that the case that Mr. Talbot relies on, the line of cases, such as Bruce against the Lumbermen's Insurance Company, dealt with exceptions to the policy saying "where it is made an exception in the policy, there need be no causal relation between the loss and the exception." The Bruce case dealt with explosives. Explosives were specifically mentioned in the policy and every case that followed the Bruce against the Lumbermen's doctrine dealt with an exception in the policy, your Honor—every case. Now, you don't have this matter dealt with in exceptions at all. The exceptions are up at the top of the page here [307] (indicating), where it—the exception—the loss or damage caused by frost, corrosion and such. Counsel, in the exclusions—now, you would ordinarily consider an exclusion means what it says here (indicating): "This certificate does not cover the following items" —they're excluded. It isn't mentioned there. You have to go down in the General Conditions to find the general clause that gives Mr. Talbot's argument any support or basis in this policy. So, I say, the Bruce against the Lumbermen's case does not apply here. This was not an exclusion. It was under the General Conditions—the first part of the argument.

Now, if you take the main part of his argument—

that is, that the plane was engaged in an unlawful purpose or that the flight was for an unlawful purpose—he asks your Honor to find, as a matter of law because of these regulations and ICC restrictions, that it was an unlawful purpose. Now, your Honor, I don't see how that matter could have been submitted to the jury more plainly than your Honor submitted it in the instruction. Your Honor took what law there was available on purpose, the definition of the word purpose and one of them was a Circuit Court of Appeals case that I quoted from in my proposed instruction which your Honor gave where purpose was the idea of the Court. They wanted to define purpose and those exact words were [308] used by your Honor. We took "purpose" from Webster's dictionary and gave it to the jury and then told the jury this plane concededly was flying dynamite from Iliamna Bay to Big Mountain. Here are the definitions of "purpose" from the best sources we could find them. "Do you think that the purpose of this flight was unlawful," and they said "no." How could it have been submitted any fairer, I would like to know, than that? Now, that is the only exclusion, your Honor, the only exclusion that Lloyd's is relying on because it's No. 4 in the General Exclusions, and remember there's exceptions up here before the exclusions—exceptions, not exclusions—and they exclude a flight for an unlawful purpose and that's how your Honor instructed the jury.

All right. So then for the rest of the argument you have to be concerned with the General Condi-

tions with the exception of the argument on waiver which comes under General Exclusions, but a different paragraph because there, the paragraph that Mr. Talbot is relying on says, "any loss or damage or liability arising from," which specifically relates to the wording in paragraph one—back to the heading of the paragraph—"arising from," and then it says, any flying which is done without a waiver where a waiver should have been obtained. All right; just for the moment, your Honor, assume that this order S-712 [309] didn't apply to Alaska. I don't concede that at all. Assume for the moment it didn't. We'll say, all right, Cordova Airlines was carrying dynamite. They should have had a waiver from the Civil Aeronautics Administration. They did not have such a specific waiver. Now, read the heading or the preface to the paragraph: "Any loss, damage or liability arising from any flying where a waiver should have been obtained and was not obtained"—arising from—the result of, cause of, any loss resulting from, cause of, any flying done without a waiver.

Admittedly, the dynamite didn't explode. The dynamite didn't cause this crash. It could have been loaded with turnips or anvils or anything else. So, was carrying the dynamite without a waiver—did the loss arise from that? No. In any event, the jury was given the right to decide that question, too, and we are using the—their own contract wording. They devised this policy. "Arising from"—that's simple enough—"arising from" or the result of any flying done without a waiver where a waiver should have

been obtained; otherwise, why didn't they use "aris"—why did they use "arising from"? Why didn't they say "this policy does not include any flying done without a waiver"; but they said, "any loss or damage or liability arising from." There, you have the requirement that there must have been a causal relation [310] between the loss and the failure to get the waiver. So, entirely apart from S-712, the jury must have found, and I think they were properly instructed on that point, that the loss was because they did not get a waiver, or the result of, cause of. There must have been causal relation there because the policy says so.

This is not the Bruce case where it says this policy does not cover the carriage of explosives in your truck, to a trucking line, and the trucking line carried explosives. Any way, the word explosives, of course, is not even mentioned in this policy.

All right, now the overloading. I think that the matter of overloading was handled too leniently in favor of the defendants because I think that being in the General Conditions and a question of fact that the jury must first have found, first, whether or not the plane was overloaded. If they found the plane was overloaded then the next question was, did the overload cause the crash?

Thirdly, and your Honor denied me this, and I was using as a basis the Ninth Circuit Court of Appeals case in the Eglestar Insurance Company—your Honor will remember those two decisions where the Court had its trouble making up its mind. Thirdly, I thought I was entitled to an instruction

with regard to due diligence [311] because, your Honor, Paragraph 3 here, your Honor denied me any instruction on that—Paragraph 3 in the General Conditions which said "the assured shall use due diligence and do and concur in doing all things reasonable and practicable to avoid any loss or damage." Now, that means something. It was put in the policy for a reason, but I didn't get any instruction on that although I requested some. So, my argument and my proposed instruction provided that if the jury finds there was an overload they must then next find, did the overload cause the crash? If it did, then, lastly, did Cordova—were they negligent in allowing a situation like that to arise? In other words, were they negligent in not having instructed Haley, indoctrinated him, issued blanket orders to all their pilots not to overload or—in some fashion were negligent because that clause was put in that policy for a meaning. It had some meaning in this situation, but I never got the benefit of that in my instruction and I objected at the time, your Honor, and I felt I was entitled to it sincerely and in the Ninth Circuit Court of Appeals cases that was considered. They construed due diligence in doing all things reasonably and practicable as amounting to a warning to the assured.

Now, you must not be negligent in permitting any violation of the Operations Limitations. I think I was [312] wronged in these instructions more than the defendant was. I don't think the defendant was entitled to the instruction on causal relationship that he got and I objected to it and I

think that if the jury found in our favor it's all the more reason to believe that under the wording of these Exclusions and General Conditions that we were entitled to have found in our favor.

Now, just a word, your Honor, with respect to S-712. Mr. Talbot lays some emphasis on the preamble to that order. It was designed for shipments of dynamite, apparently, that for some particular reason were funneling out of Tucson, Arizona, and, as the wording of the preamble, was to almost any military airport or construction site in the United States. Well, the Act says "United States" means Alaska, but I was relying, and others relied as Smith said on the stand, on the wording of the order. There is the meaning of it. Of course, they had a local situation in mind when they made the order and they recited it as a reason for making an order, but the order itself is what speaks. It contemplates dynamite belonging to the Air Force and we stipulated in this case that the dynamite here did belong to the Air Force. By contract, anything Morrison-Knudsen acquired became the property of the U. S. Air Force the moment it was acquired. [313]

The order contemplated that the flights would be made by chartered craft. This craft was chartered. Mr. Talbot says "exclusive." I don't contend that the order, in portion, says that it must be exclusive at all. Possibly in some cases in the United States where there are large cities and they're flying in and out, they want the control tower provisions within that order, too, and arrangements made with

local municipal officials. Well, none of that applied here in this particular instance. You have no control tower. You had none of the aspects of—they wanted in the order in case they were applicable in large congested populated centers, but, here we had Air Force dynamite. We had a chartered plane. We had a defense project. We had the dynamite and it was being flown to an Air Force field. It was construed by many people, Smith said, his company to be a blanket authority, but we don't have to rely on that. We don't have to rely on it because, as I pointed out, the matter of unlawful purpose under the exception was handled fairly, put to the jury, and it couldn't have been put in a plainer manner and they decided in favor of the plaintiff.

Your Honor, what purpose a new trial could serve I cannot possibly see. A judgment notwithstanding the verdict would certainly be unwarranted under any theory or reasoning, and I think, if anything, in the wording [314] of their own contract, the defendants received an instruction highly more favorable to their case than they were entitled to and the plaintiff was deprived entirely of any benefit of the wording of Paragraph 3 of the General Conditions.

Mr. Talbot: Your Honor, I feel obliged to correct Mr. Nesbett in one or two minor details in reply. His recollection of the Bruce case is mistaken. Explosives had nothing to do with the Bruce case. The Bruce case involved whether or not a small plane carried parachutes and both the District Court and the Court of Appeals found that the

carrying, or the non-carrying, of the parachutes would have had absolutely nothing to do with the crash or with the damage and loss of life which resulted, but they held that the policy should be enforced in accordance with its plain meaning.

It's true that the Bruce case does rely upon a Supreme Court case in which explosives were involved, but the opinion of the Bruce case is applicable here. We don't care whether or not—for the purposes of this lawsuit, we don't care whether or not the overloading caused the crash or the failure to get permission from Farwest General Agency caused the crash or the fact that the purpose of the flight was unlawful. Now, it's undisputed that the purpose of the flight was to move a quantity of dynamite [315] from Iliamna Bay to Big Mountain. Mr. Pollock's letter, which is Exhibit B and was received without objection, states it in so many words, speaking for Morrison-Knudsen, that the purpose was to move the dynamite. There is no dispute there. The only question is whether or not that was a lawful purpose in view of these regulations and whether admitted facts are lawful or unlawful it seems to us is a question of law for the Court and not a question of fact for the jury because the facts were admitted.

Now, the policy says "unlawful purpose." It doesn't say "immoral purpose," as Mr. Nesbett would read. We concede that it was useful and beneficial to get this dynamite from Iliamna Bay to Big Mountain. If it had been done lawfully, then the plane would have been used for a lawful pur-

pose and we think that that is all that is involved.

Now, on reading the General Exclusions I think Mr. Nesbett left out a phrase which must be included: "General Exclusion 1 (c)." I read as follows: "This Certificate does not cover any loss, damage or liability arising from the use of the aircraft * * *" (repeating) "arising from the use of the aircraft for any flying in which a waiver issued by the Civil Aeronautics Authority is required," and so forth. And it is the use of the aircraft which is prohibited and excluded and the same is true of [316] the wording of General Exclusion No. 4.

Now, we did not stipulate that this dynamite belonged to the U. S. Air Force. We stipulated that it was property of the United States Government. Whether that makes a difference or not I cannot say, but for matters of fact it was deemed by the parties "Government dynamite." But Regulation 712, your Honor, the word "dynamite" does not appear anywhere in that regulation and I think Mr. Nesbett is seriously mistaken in thinking that the CAB had before it any question having to do with commercial dynamite. In fact, they say "security-classified explosives" and we don't rely on the preamble part of that order although it's extremely illuminating to the Court in getting at what the CAB intended, but one can cut that order in half right above the order provision and it doesn't change any of the quotations which I read to your Honor which were all from the order part. The Air Force is given permission to carry classi-

fied explosives in aircraft chartered specifically for that purpose exclusively in fact for that purpose where the Air Force certifies that it's a proper shipment in accordance with CAB regulations and the carrier provides a hand-to-hand signature service.

Now, those are the order portions of the regulation within which the Plaintiff must bring itself.

The Court: I instructed the jury several [317] times during the trial that their duty was to evaluate and determine the facts and I had nothing to do with the determination of the facts. They had to take the law from the Court and the Court was not going to interfere in any way from their determination of the facts.

Now, one of the questions presented to the jury was whether or not the plane was overloaded. That is a question of fact. I can't substitute my opinion for the opinion of the jury.

Another question presented to the jury is whether or not the airplane was used for an unlawful purpose. I might have thought it was used for an unlawful purpose but the jury—that is a question of fact. I submit it to the jury; the jury decided it wasn't used for an unlawful purpose.

Then there was another question: Whether or not the regulation gave blanket authority. They were told about the regulation. The regulation was given to them and they had it before them. It was a question of fact for them to decide.

I think this is a question of fact for the jury and even though it—if I had been trying the case without a jury I might have come to a different

conclusion. Nevertheless, I can't substitute my opinion for the opinion of the jury. Consequently, the motions must be denied and [318] they are so denied.

Will you prepare the order?

Mr. Nesbett: Yes, your Honor.

Mr. Talbot: Could your Honor advise me whether or not a judgment has been entered in this case? I haven't received any notification from the Clerk.

The Court: I think it has. We've got a cost bill; we wouldn't have a cost bill before we had a judgment, would we? (Pause.) Let's see——

Mr. Nesbett: 12th of June, your Honor, I think it was.

The Court: Yes, the judgment was signed and filed on June 12th.

Mr. Talbot: Thank you.

The Court: You know, down our way unless their documents are approved as to form we have to hold them five days so that it will give opposing counsel an opportunity to object to the form of the order and to the order itself. I held this for five days and I never had any notice of any objections although I understand the objections were filed but they were never brought to my attention, so——

Mr. Talbot: No objections were filed as to the form of the judgment, your Honor.

The Court: Well, your motion was made and——

Mr. Talbot: Yes, sir. [319]

The Court: So, I held it, but I think this is a question of fact for the jury and the jury determined adversely and I can't set it aside and I am

quite sure that attorneys generally, regardless of whether they're on the losing side or not, would like the Court to be consistent in the ruling that when the jury decides a fact not to interfere with it. It's very, very unsatisfactory for an attorney, after submitting questions of fact to the jury, to have some Court come along and change the conclusions on them, and it's very discouraging sometimes, so I am just sorry, but I just can't find any merit in your motions.

They will be denied.

The Court will now stand in recess until twenty minutes after 2:00.

United States of America,
Territory of Alaska—ss.

I, Bonnie T. Brick, Official Court Reporter of the above-entitled Court, hereby certify:

That the foregoing is a true and correct transcription of proceedings on appeal of the above-entitled action, taken by me in stenograph in open court at Anchorage, Alaska, on May 29, June 2, 3, 4 and 20, 1958, and thereafter transcribed by me.

/s/ BONNIE T. BRICK.

[Endorsed]: Filed November 18, 1958. [320]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE
ORIGINAL RECORD

I, Wm. A. Hilton, Clerk of the above-entitled court, do hereby certify that pursuant to Rule 10 (1) of the Rules of the United States Court of Appeals, Ninth Circuit, and Rules 75 (g) and 75 (o) of the Federal Rules of Civil Procedure, I am transmitting herewith the original papers in my office dealing with the above-entitled action or proceeding. No designation of record having been filed.

The papers herewith transmitted constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit, San Francisco 1, California, from Judgment filed and entered in the above-entitled cause by the above-entitled court on the 12th day of June, 1958.

Dated at Anchorage, Alaska, this 13th day of November, 1958.

[Seal] /s/ WM. A. HILTON,
Clerk.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE
ORIGINAL RECORD

I, Wm. A. Hilton, Clerk of the above-entitled court, do hereby certify that pursuant to Rule 10

(1) of the Rules of the United States Court of Appeals, Ninth Circuit, and Rules 75 (g) and 75 (o) of the Federal Rules of Civil Procedure, I am transmitting herewith the original papers in my office dealing with the above-entitled action or proceedings as designated by counsel for the Defendant-Appellant, including Transcript of Proceedings and Exhibits.

The papers herewith transmitted constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit, San Francisco 1, California, from Judgment filed and entered in the above-entitled cause by the above-entitled court on the 12th day of June, 1958.

Dated at Anchorage, Alaska, this 10th day of December, 1958.

[Seal] /s/ WM. A. HILTON,
Clerk.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE SUPPLEMENTAL ORIGINAL RECORD

I, Wm. A. Hilton, Clerk of the above-entitled court, do hereby certify that pursuant to Rule 10 (1) of the Rules of the United States Court of Appeals, Ninth Circuit, and of Rules 75 (g) and 75 (o) of the Federal Rules of Civil Procedure, and the additional designation of record on appeal by counsel for Plaintiff-Appellee, I am transmitting

herewith additional Original Papers in my office dealing with the above-entitled cause.

The original papers herewith transmitted are to supplement and become a part of the original papers transmitted to the United States Court of Appeals, Ninth Circuit, San Francisco, California, on the 10th day of December, 1958.

Dated at Anchorage, Alaska, this 12th day of December, 1958.

[Seal] /s/ WM. A. HILTON,
Clerk.

[Endorsed]: No. 16283. United States Court of Appeals for the Ninth Circuit. Underwriters at Lloyd's of London, Victoria Insurance Company, Ltd., Orion Insurance Company, Ltd., and Eagle Star Insurance Company, Ltd., Appellants, vs. Cordova Airlines, Inc., Appellee. Transcript of Record. Appeal From the District Court for the District of Alaska, Third Division.

Filed: November 17, 1958.

Docketed: December 12, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.